Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND,
Petitioner,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, INC., a California corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Petitioner, Tommie Ann Hildebrand, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of California.

OPINIONS BELOW

The opinion of the Supreme Court of the

State of California (Appendix A, infra) is reported at 19 Cal.3d 765 (1977). The California Supreme Court's Order denying the petition for rehearing (Appendix B, infra) is reported at 19 Cal.3d (minutes) 5 (1977). The opinion of the Court of Appeal of the State of California, Third Appellate District (Appendix C, infra) is not reported. The opinion of the Sacramento County Superior Court (Appendix D, infra, under the caption "Memorandum Opinion"), its Findings of Fact and Conclusions of Law (Appendix E, infra), and its Judgment (Appendix F, infra), are not reported.

JURISDICTION

The opinion of the California Supreme Court was filed on August 9, 1977. A timely petition for rehearing was denied by order entered September 15, 1977.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether, in light of this Court's holding in Sherbert v. Verner, 374 U.S. 398 (1963), a state's denial of unemployment insurance benefits to a Sabbatarian whose loss of employment was solely due to her observance of the Sabbath, unconstitutionally burdens the Sabbatarian's First Amendment right to the free exercise of her religion?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

The Fourteenth Amendment to the United States Constitution provides in pertinent

part: "...nor shall any State deprive any person of life, liberty or property, without due process of law;..."

Section 1256 of the California Unemployment Insurance Code provides in pertinent part:

> An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work.

STATEMENT OF THE CASE

Petitioner, Tommie Ann Hildebrand, was employed annually from 1966 until 1973 as a trimmer by Cel-A-Pak, Inc., a vegetable packing plant in Salinas, California. The work was seasonal, depending upon the

harvesting of crops. Normally, the plant began operations in April and finished its packing season in January. Employees normally worked at least a five-day week from spring through late winter. During the peak season, employees ordinarily worked a six-day week, including Saturdays.

In 1970, Mrs. Hildebrand became a member of the Worldwide Church of God. One of the tenets of this religion requires that she perform no work from sundown Friday until sundown Saturday, and that she must attend church services on Saturday, which is the Sabbath for this faith. Following her baptism as a member of the Worldwide Church of God, she informed her employer of her religious beliefs and during the entire 1970 and 1971 packing seasons her employer did not require her

to work Saturdays so that she could attend church in accordance with her religious beliefs. However, in 1972 her employer refused to allow her to take time off for the Sabbath. Mrs. Hildebrand objected to working Saturdays and filed a complaint with her union in hope that the union would vindicate her right to observe the Sabbath. She continued working during the 1972 season, including Saturdays, while awaiting action by her union.

On April 9 , 1973, Mrs. Hildebrand returned to work for Cel-A-Pak. After working only a few days, none of them a Saturday, Mrs. Hildebrand became ill and took an extended sick leave. On April 12, 1973, after Mrs. Hildebrand had taken her leave, her employer posted a notice saying that all employees would have to work

Saturdays. She returned to work following her sick leave on Monday, June 11, 1973, and worked through Friday, June 15. On June 15, Mrs. Hildebrand advised her employer that her religious beliefs would not permit her to work Saturdays and that accordingly she would be unable to report for work the following day, Saturday, June 16. She did not report to work on the morning of Saturday, June 16, 1973. On that Saturday morning, Mrs. Hildebrand received a telephone call from Mr. Clyde Lewis, the son of the company president. Mr. Lewis asked her whether she was coming to work that morning, and she reiterated to him that she was not coming to work but rather she was going to church instead. Mr. Lewis then asked her if she had quit her job, and she replied that she had not quit and that she would be at

work on Monday morning as usual. She then attended church services. On Monday morning, June 18, 1973, Mrs. Hildebrand reported to work at the regular time and began work on the production line. She was then advised by the company president, Allen B. Lewis, that she would not be permitted to work because the company had "assumed" she had quit on Saturday, and that she had been replaced.

Mrs. Hildebrand thereupon applied for unemployment insurance benefits. Her application was denied on the ground that she had voluntarily quit her job without good cause and she was thereby disqualified from receiving benefits under California Unemployment Insurance Code §1256. She thereafter applied for a hearing before a referee of the California Unemployment Insurance Appeals Board.

An administrative hearing was held on October 24, 1973 in Salinas, California. At this hearing, petitioner asserted that the State's denial of unemployment benefits violated her right to the free exercise of her religion, as set out by the United States Supreme Court in Sherbert v. Verner. She testified that she had refused to work on Saturdays because "[M]y salvation depends of [sic] me keeping the ten commandments, and one of the commandments is keeping the Sabbath."

The referee issued his decision on October 30, 1973, finding that Mrs. Hildebrand had voluntarily quit her job without good cause and was therefore ineligible to receive unemployment insurance benefits. The decision of the referee was sustained by the California Unemployment Insurance Appeals Board on

January 10, 1974 (Appendix G, infra).

PROCEEDINGS BELOW

On January 30, 1974, Mrs. Hildebrand filed a timely petition for a writ of mandate in the Superior Court for Sacramento County to review the decision of the Appeals Board, pursuant to the provisions of Section 1094.5 of the California Code of Civil Procedure. In her petition Mrs. Hildebrand alleged that the denial of unemployment insurance benefits violated her rights under the Free Exercise Clause of the First Amendment. After independently reviewing the evidence in the administrative record, the court entered judgment in Mrs. Hildebrand's favor on May 20, 1975 (Appendix F). In its Findings of Fact and Conclusions of Law, the trial court found that the "Petitioner's religious beliefs are genu-

inely held." (Appendix E at 58a.)

The trial court also found, inter alia:

> 12. Petitioner was either discharged or voluntarily quit her employment with CEL-A-PAK because, as a practicing member of the Worldwide Church of God, she went to church on Saturday instead of working at her regular position.
>
> 13. The denial of unemployment compensation benefits forces petitioner to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion and work on Saturday on the other hand.
>
> 14. No compelling state interest

has been shown by respondents to justify the denial of benefits to petitioner who refused, for religious reasons, to work on Saturdays. (Appendix at 60a-61a.)

From these Findings, the trial court concluded:

> 6. There is no distinction between voluntarily quitting because of a condition imposed by an employer which would cause the employee to violate his or her religious beliefs and being discharged for refusing to work while practicing acceptable religious beliefs. Sherbert v. Verner, 374 U.S. 398 (1963).
>
> 7. The withholding of unemployment compensation benefits to petitioner was in violation of the guidelines set forth in Sherbert v. Verner, 374 U.S. 398 (1963); accordingly, the decision of the respondents must be overturned and petitioner's claim for benefits should be granted. (Id. at 63a)

On July 3, 1975 Cel-A-Pak, Inc. filed a notice of appeal from the trial court's judgment. Neither the California Unemployment Insurance Appeals Board nor the California Employment Development Department appealed the trial court's decision, and neither have pursued the matter further. Pursuant to the Judgment, the Appeals Board ordered Petitioner's benefits paid. (Appendix at 90a.) The Court of Appeal for the Third Appellate District affirmed:

We perceive no meaningful distinction between this case and Sherbert v. Verner. As the majority of the federal Supreme Court put the matter, to disqualify this applicant either for refusing a job offer or for resigning would "apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." (Sherbert v. Verner, supra, 374 U.S. at p. 410.) (Appendix at 41a-42a.)

The Supreme Court of California granted the employer's petition for hearing, and reversed the judgment of the trial court, Justice Mosk dissenting. In its decision the court distinguished Sherbert v. Verner on the grounds that whereas in Sherbert the appellant had refused to accept suitable work without good cause, in the instant case petitioner "having initially accepted employment, thereafter 'voluntarily left without good cause.'" (Appendix at 9a.) In addition, the court found that in "Sherbert the condition of work imposed upon the initial employment required an impermissible sacrifice of conscience. In the matter before us, the condition was knowingly and voluntarily accepted, work commenced, and a change of mind and heart thereafter ensued, doubtless motivated by the very deepest and most sincere of impulses:" (Appendix at 10a-11a.) Petitioner was therefore held to have voluntarily left work without good cause and thus properly denied unemployment benefits. A petition for

rehearing was subsequently denied on September 15, 1977, Chief Justice Bird and Justice Mosk dissenting.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the decision of the California Supreme Court substantially affects her fundamental constitutional right to the free exercise of her religion and is not in accord with the applicable decisions of this Court in the following respects:

1. In Sherbert v. Verner, 374 U.S. 398 (1963), this Court held that South Carolina's denial of unemployment benefits to a Sabbatarian who had been discharged from her work at a cotton mill for refusing for religious reasons to work on Saturdays or seek any other Saturday work, unduly burdened the Sabbatarian's right to the free exercise of her religion. Mr. Justice Brennan stated for the majority: "Our holding . . . is only that South

Carolina may not constitutionally apply the eligibility provisions [of its unemployment insurance law] so as to constrain a worker to abandon his religious convictions respecting the day of rest." Id. at 410.

This holding, directly applicable to the instant case, was predicated upon two settled constitutional principles: (1) that the state may not, without running afoul of the First Amendment, "condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith [since to do so] effectively penalizes the free exercise of her constitutional liberties"; and (2) that First Amendment rights may not be infringed absent a showing of a compelling or overriding governmental interest. Id. at 406.

In direct contradiction to the rule announced in Sherbert, and on nearly

identical facts, the decision of the California Supreme Court upholds the denial of unemployment benefits to a Sabbatarian whose loss of employment stemmed solely from adherence to her religious beliefs in declining Saturday work in order to attend church. As such, the court's decision offends the basic principles of stare decisis and directly conflicts with the fundamental doctrine of the First Amendment that the states shall not impair the free exercise of religion. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Wisconsin v. Yoder, 406 U.S. 205 (1972).

Moreover, citing no authority from this Court, the California Supreme Court employs a concept of waiver of First Amendment rights to justify its departure from Sherbert. The court seems to hold that having once strayed from the precepts of her religion by working on Saturday, the

petitioner somehow forfeits her right to freely exercise her religion without state infringement. The court did not even consider the fact that the petitioner, due to economic necessity, may have had no real choice between working Saturdays and abiding by the precepts of her religion.[1] Moreover, this notion of waiver is novel to considerations of the free exercise of religion[2] and should not be allowed to creep into First Amendment doctrine. That the "preferred freedoms" of the First Amendment could be curtailed so easily by the cursory application of a waiver doctrine poses grave constitutional questions, and it is incumbent that this Court grant review to correct the error of the court below.

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[1] There can be no waiver when the element of choice is in reality one "between the rock and the whirlpool." See Garrity v. New Jersey, 385 U.S. 493, 498 (1967).

[2] Cf. Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972).

I

THE FACTS OF THIS CASE ARE INDISTINGUISHABLE FROM AND ARE CONTROLLED BY THE DECISION IN SHERBERT v. VERNER.

The facts presented to this Court in Sherbert were as follows:

Adell Sherbert had been employed since 1938 at Spartan Mills; although Saturday work had always been available on a voluntary basis, she had never chosen to work on Saturday. In 1957, she became a Seventh Day Adventist; this religion forbade her working from sundown Friday to sundown Saturday. In 1959, her employer made Saturday work mandatory. Because of her religious beliefs, Sherbert refused to work on her Sabbath, and when she missed the next six Saturdays of work, she was fired. She immediately applied for unemployment benefits; she also sought work at other mills in the area, but because they also required Saturday employment, her efforts were unsuccessful. Her claim for

unemployment benefits was denied by the South Carolina Employment Security Commission on the grounds that she: (1) was not able and available for suitable work and (2) had been discharged for misconduct. The Commission's able-and-available decision was affirmed by the Supreme Court of South Carolina, but the misconduct disqualification was reversed. Instead, the court disqualified Sherbert on a different second ground, i.e., that she "failed to accept, without good cause, available suitable work offered her by her employer." South Carolina Unemployment Compensation Act § 68-114(3)(a)(ii).[3] (Emphasis added.)

The facts presented by petitioner here parallel Sherbert in almost every particular. As in Sherbert, after she had been employed for several years by her employer,

[3] Sherbert's appeal to this Court presented both grounds of disqualification for consideration (Jurisdictional Statement at 2-3), and this Court's decision addressed both points (374 U.S. at 401, especially n. 4).

petitioner adopted a religion requiring its members to observe the Sabbath on Saturday by attending church services and not laboring from sundown Friday to sundown Saturday. For both, the abstention from labor on Saturday was a bona fide religious belief. From the outset of their religious conversion, both Sherbert and the petitioner insisted upon observing the Sabbath; Sherbert missed six consecutive Saturdays, while the petitioner here was excused from Saturday work for two seasons by her employer, worked the next season only under protest, and when that protest proved futile, resumed her steadfast refusal to work on the Sabbath. In both cases, it is undisputed that the claimants would not have been unemployed but for their Sabbatarian belief, and in both cases the claimants remained actively seeking work in the local labor market.

Despite these striking factual parallels,

the California court's decision virtually disregards both the holding and the rationale of this Court's decision in Sherbert. The doctrine of stare decisis does not permit such a departure from the principles established by this Court absent a meaningful constitutional distinction between the two cases.

The decision of the majority below appears to perceive two differences between this case and Sherbert. First, reliance is placed on the "fact" that petitioner here voluntarily quit without good cause, while in Sherbert the claimant had refused to accept suitable work without good cause.[4] Second, the majority urges

[4] Sherbert is distinguishable from the present case. In Sherbert the high court examined the circumstances under which a prospective employee refused without good cause "to accept available suitable work." Although California imposes a similar "suitable work" requirement upon claimants (§ 1257), the legality of that statute is not before us. Instead, measuring the constitutionality of

that petitioner's initial reluctant acceptance of Saturday work amounts to a kind of waiver of previously held First Amendment rights, thereby permitting the state to deny her benefits free from strict judicial scrutiny.[5] These purported distinctions not only establish novel and dangerous concepts of constitutional law, but also demonstrate an erroneous understanding of both the facts

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section 1256, we must determine whether plaintiff, having initially accepted employment, thereafter left work "voluntarily without good cause."

(Appendix at 8a-9a.)

[5]The court stated:

> We emphasize the critical difference in the two cases. As illustrated by, and rejected in, Sherbert the condition of work imposed upon the initial employment required an impermissible sacrifice of conscience. In the matter before us, the condition was knowingly and voluntarily accepted, work commenced, and a change of mind and heart thereafter ensued, doubtless motivated by the very deepest and most sincere of impulses.

(Appendix at 10a-11a.)

and holding of this Court in Sherbert.

A. WHETHER PETITIONER VOLUNTARILY QUIT, WAS DISCHARGED, OR TURNED DOWN SUITABLE WORK IS OF NO CONSTITUTIONAL SIGNIFICANCE SINCE IN EACH CASE THE DENIAL OF UNEMPLOYMENT BENEFITS PENALIZES HER FOR FOLLOWING THE TENETS OF HER RELIGION.

While the court below points to the fact that the petitioner here left preexisting employment while in Sherbert the claimant turned down a suitable work offer, it is difficult to discern from the majority opinion why this was believed to be constitutionally significant.[6] At the outset, it should be noted that the opinion below ignores the fact that the appellant in Sherbert had also been discharged from her past employment for her refusal to work on her Sabbath, having missed six

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[6]Both standards for disqualification incorporate a "good cause" exception which takes into account a balancing of personal and employment factors. See California Unemp. Ins. Code §§ 1256, 1258; Sanchez v. Unemployment Ins. Appeals Bd., 20 Cal.3d 55, 69-70 (1977); see also 1B Unempl. Ins. Rep. (CCH) § 1975, at 4490-93.

consecutive Saturdays and been disqualified on that basis. In other words, the appellant in Sherbert was also "voluntarily" unemployed in the sense that, as in the instant case, her unemployment resulted from her deep commitment to observing the Sabbath. However, this fact did not prevent the Court from finding that Sherbert's constitutional rights had been violated.[7]

[7]The court below expresses concern for the state policy that "unemployment benefits are reserved 'for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.'" (Appendix at 9a.) But the claimant in Sherbert suffered from exactly the same "fault" as did Mrs. Hildebrand--she had left her job rather than violate her religious beliefs. Thus, these same state policy concerns were before this Court in Sherbert and did not alter the result. Accord, Lincoln v. True, 408 F. Supp. 22 (E.D. Ky. 1975) holding that a Jehovah's Witness whose religious objections to the use of tobacco required her to quit her employment with a tobacco products manufacturer had voluntarily quit with good cause.

Moreover, all persons who "voluntarily" leave their employment are not subject to disqualification under the unemployment

The short of the matter is that, precisely as in Sherbert, the denial of benefits to petitioner because she lost her job rather than work on her Sabbath "effectively penalizes the free exercise of her constitutional liberties." Sherbert, 374 U.S. at 406. Moreover, by denying her benefits, the state greatly increased the economic pressure on petitioner to forfeit her religious beliefs and work on her Sabbath--either with Cel-A-Pak or otherwise. Likewise, if this decision is allowed to stand, similarly situated workers in California will be compelled to work on their Sabbath rather

compensation program, for there would be no need for a "good cause" exception to the voluntary-quit disqualification if such were the case. See Sherbert, 374 U.S. 401 n. 4. Thus, the courts of many states, including California, have long recognized that involuntary unemployment includes persons who voluntarily leave work for compelling personal reasons. See California Portland Cement Co. v. California Unempl. Ins. Appeals Bd., 178 Cal. App.2d 263, 272 (1960); Bliley Elec. Co. v. Unempl. Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A.2d 898, 903 (1948).

than leave their employment since under the ruling below, they will be aware that should they decline such work, they will be disqualified from receiving unemployment insurance benefits. Thus, the same burdening of the exercise of First Amendment rights providing the basis for this Court's decision in Sherbert was before the California Supreme Court in the instant case; the opposite result ensued.

B. THE CALIFORNIA SUPREME COURT'S FINDING THAT PETITIONER HAD WAIVED HER FIRST AMENDMENT RIGHTS BY TEMPORARILY ACCEDING TO HER EMPLOYER'S DEMAND THAT SHE WORK ON HER SABBATH IS UNPRECEDENTED AND INCONSISTENT WITH THIS COURT'S DECISION IN WISCONSIN v. YODER.

The court below also attempts to distinguish Sherbert by repeatedly referring to the petitioner's "voluntary" acceptance of Saturday work (Appendix A at 11a, 13a-14a) implying that she has somehow "waived" her constitutional right to the free exercise of her religion. As Justice Mosk notes in

his dissent, however, to imply, on such a tenuous basis, a waiver of the petitioner's First Amendment right to the free exercise of her religion is unwarranted:

> In effect, the state appears to decree that plaintiff now forfeits her right to adhere to religious practices without penalty because of a limited waiver in the past. As the majority concede, there is no authority upholding this novel justification for governmental intrusion into religious liberty. Indeed, the theory not only clearly offends the Sherbert principle, it is contrary to the landmark case of Speiser v. Randall (1958) 357 U.S. 513, which emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, to inhibit or deter the exercise of First Amendment freedoms.

(Appendix A at 25a.)

Indeed, not only is the implication of a waiver at odds with the cases holding that governmental benefits cannot be conditioned on the forbearance or waiver of First Amendment rights,[8] it also is squarely at odds with the many cases holding that important constitutional rights cannot be waived except in a knowing and intelligent manner. See, e.g., Edelman v. Jordan, 415 U.S. 651, 673 (1974); D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

[8]The majority opinion below thoroughly ignores the constitutional principle that receipt of government benefits may not be conditioned in a manner which "deter[s] or discourage[s] the exercise of First Amendment rights . . . and thereby threaten[s] to 'produce a result which the State could not command directly.'" Sherbert, 374 U.S. at 405, quoting Speiser v. Randall, 357 U.S. 513, 526 (1958). The continued vitality of this constitutional prohibition remains unchanged. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972). Only last Term, this principle was reaffirmed in an opinion relying inter alia

Furthermore, there has been no case dealing with state infringement upon the free exercise of religion that has found any waiver, actual or implied, of the protections afforded by the First Amendment. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972); Lincoln v. True, 408 F. Supp. 22 (.D. Ky. 1975). In each of the above cases, the court recognized, at least implicitly, that though one may submit to infringements upon religious

specifically on Sherbert v. Verner:

> This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights.
>
> [I]n Sherbert v. Verner, . . . unemployment compensation, . . . was the government benefit which could not be withheld on the condition that a person accept Saturday employment where such employment was contrary to religious faith.

Elrod v. Burns, 427 U.S. 347, 358 n 11 (1976) (per Brennan, J., with two Justices joining and two Justices concurring in the result) (emphasis added.)

freedom to a certain point, at some point further submission is intolerable. As stated by Justice Mosk: "That the plaintiff may have permitted economic necessity to conquer her conscience in a previous period of employment seems a slender rationale upon which to justify governmental compulsion to subordinate religious convictions in connection with the current seasonal job ." (Appendix A at 24a-25a.)

II

THERE IS NO COMPELLING STATE INTEREST WHICH JUSTIFIES THE INFRINGEMENT ON PETITIONER'S RIGHT TO THE FREE EXERCISE OF HER RELIGION.

The decisions of this Court have consistently held that only compelling or overriding governmental interests will serve to justify the abridgement of First Amendment freedoms.[9] This heightened degree of

[9] See, e.g., Wooley v. Maynard, 430 U.S. 705, 716 (1977); Buckley v. Valeo, 424 U.S. 1, 64 (1976); Elrod v. Burns, 427 U.S. 347, 362 (1976); NAACP v. Button, 371 U.S. 415, 438 (1963); NAACP v. State of Alabama, 357 U.S. 449, 464 (1958); Speiser v. Randall, 357 U.S. 513, 529 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

protection has been believed necessary since "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society." NAACP v. Button, 371 U.S. 415, 433 (1963). And as the Chief Justice has noted, the value placed upon religious freedom in American society has been particularly high, requiring that it be "zealously protected, sometimes even at the expense of other interests of admittedly high social importance . . . ." Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).[10]

[10] Mr. Justice Stewart has similarly stated:

> I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth.

Sherbert, 374 U.S. at 413 (Stewart, J. concurring); see also Pfeffer, The Supremacy of Free Exercise, 61 Geo. L.J. 1115, 1121 (1973).

For that reason, state interference with the right of the individual to freely exercise his or her religious beliefs must be subjected to the closest kind of strict judicial scrutiny. "[I]n this highly sensitive area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" Sherbert, 374 U.S. 398, 406, quoting Thomas v. Collins, 323 U.S. 516, 530 (1945); accord, Wisconsin v. Yoder, supra, 406 U.S. 205; see also Cantwell v. Connecticut, 310 U.S. 296 (1940).

Yet, in the instant case the majority of the court below fails even to make mention of the fundamental nature of the interest involved or the compelling state interest required to permit its infringement. The apparent reason for the court's silence was its erroneous finding that petitioner's First Amendment rights had not been infringed. See section IA, ante.

Rather, the court gave short shrift to the importance of religious liberty, demonstrating what might be viewed as "a distressing insensitivity to the demands of this constitutional guarantee" (Sherbert, 374 U.S. at 414 (Stewart, J., concurring in the result) and failed to apply the appropriate constitutional standard of review. Had they done so, no compelling state interest could have been shown.

It is well established that the state bears the burden of showing that a compelling governmental interest justifies the restriction on petitioner's free exercise of her religion. Elrod v. Burns, 427 U.S. 347, 362, and cases cited therein. No such showing has been made in the instant case.

The possibility that spurious claims would dilute the unemployment fund or disrupt employer work schedules, an interest which this Court flatly rejected in

Sherbert (374 U.S. at 407), was not demonstrated in this case either. To the contrary, the court found that petitioner's decision to honor the Sabbath was "doubtless motivated by the very deepest and most sincere of impulses." (Appendix A at 11a.)

Even assuming arguendo that petitioner did accept work with such an ignoble purpose, the court's rationale is hardly compelling. The court concedes that petitioner could have received benefits simply by refusing to go back to work: "Under Sherbert, plaintiff [petitioner] would clearly have been permitted to refuse employment with Cel-A-Pak without risking any loss of unemployment benefits for she would not have rejected 'available suitable work.'" (Appendix A at 9a-10a.) Thus, there was no need for her to resume work in 1973 in order to create a claim.[11]

[11] Under California law, any earnings from her 1973 Cel-A-Pak employment would not be considered for a new claim until at least six months later (Cal. Unemp. Ins. Code § 1275), and until she had earned a minimum of $750 in earnings would be required to establish eligibility (id. § 1281).

Thus, the prevention of spurious claims cannot justify the denial of benefits to the petitioner. Nor is there evidence in the record to demonstrate that the rule applied by the state here was necessary to prevent widespread abuse from spurious religious claims. Moreover, Sherbert requires that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights [n. omitted]." 374 U.S. at 407.

Further, the court's apparent concern that allowing persons to create unemployment claims by taking jobs under conditions

they know they cannot accept (Appendix A at 11a) is somewhat disingenuous in light of their own failure to demonstrate bad faith. Moreover, as the majority notes, none of the cases it cites to support this concern involved conditions which required the employee to forego a constitutional right. Personal reasons for quitting a job, such as wage dissatisfaction or fear of performing the job, are not constitutionally protected, but the exercise of religion is.

To the extent that the payment of benefits to the petitioner may cause an increase in her employer's contribution to the unemployment insurance fund, admittedly the employer has an interest in the administration of the unemployment insurance system.[12] However, it is the

[12]Since, as the majority concedes, petitioner would have been eligible for benefits if she had simply refused to accede to her employer's demand that she work Saturdays, the employer's account would

state's interest, not the employer's, which must justify the statute. See Syrek v. California Unemployment Insurance Appeals Board, 54 Cal.2d 519 (1960.)[13] Indeed, and perhaps most importantly, the same factor was implicitly rejected by this Court in Sherbert, for the appellant there had also left her employment because of her Sabbatarian beliefs, subjecting her past employer to increased unemployment insurance contributions under South Carolina law.

have been charged regardless of whether the petitioner accepted employment. (See Cal. Unemp. Ins. Code § 1026.) Thus, it is difficult to perceive how it has been harmed by her temporary acceptance of the work.

[13]The instant case, like Sherbert, does not involve the employer's right to hire or fire a person who refuses to work on Saturdays for religious reasons. All it involves is the state's responsibility to administer its unemployment insurance system in a way which least infringes on the constitutional rights of its residents. The crucial differences in policy considerations are well stated in King v. California Unempl. Ins. Appeals Bd., 25 Cal. App.3d 199 (1972):

> Our decision goes no further than

Nor does the primary rationale adopted by the California court--that the petitioner had voluntarily accepted employment on the condition that she work Saturdays--rise to the level of a compelling state interest. As Justice Mosk stated

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to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected; we neither hold nor suggest that a bearded person has a constitutional right to a job, and we do not reach or affect a private employer's right to manage its own business. It may also be acknowledged that payment of unemployment compensation benefits to this claimant (if such result ultimately materializes) could penalize the employer herein to the extent, if any, that its "reserve account" with the department is affected . . . . Such event, however, may be regarded as part of the price which the employer must pay for participating in an unemployment compensation system which is administered by the state and is, therefore, subject to the state's constitutional obligations; it does not mean that the employer is not free to hire and fire as it pleases.

Id. at 206-07.

in dissent, "That the plaintiff may have permitted economic necessity to conquer her conscience in a previous period of employment seems a slender rationale upon which to justify governmental compulsion to subordinate religious convictions in connection with the current seasonal job." (Appendix A at 24a-25a.)

Thus, since no compelling governmental interest justifies the denial of benefits to petitioner in the instant case, petitioner submits that the decision of the California Supreme Court was squarely at odds with Sherbert and should be reversed.

CONCLUSION

The decision below marks a serious departure from this Court's decisions protecting religious liberty and is in direct conflict with its holding in Sherbert v. Verner. The petition

for certiorari should be granted.

Respectfully submitted,

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APPENDIX

C O P Y [Filed Aug. 9, 1977]

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

TOMMIE ANN HILDEBRAND,

Plaintiff and
Respondent,

v.

S.F. 23583

UNEMPLOYMENT INSURANCE APPEALS BOARD ET AL.,

(Super. Ct. No. 243588)

Defendants;

CEL-A-PAK, INC.,

Real Party in
Interest and Appellant

Section 1256 of the Unemployment Insurance Code (all statutory references are to that code unless otherwise indicated) provides in pertinent part that "an individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause . . . ." In the matter before us defendant Unemployment Insurance Appeals Board (board) denied plaintiff's application for

unemployment benefits on the ground that she left her last employment "voluntarily without good cause" within the meaning of the section. Plaintiff then sought judicial review of the board's action through a petition for administrative mandamus (Code of Civ. Proc., § 1094.5), contending that since her employment was terminated by reason of her bona fide religious objections to working on Saturdays, denial of benefits was improper as an unconstitutional interference with her freedom of religion. The trial court agreed with plaintiff and ordered the board to grant her application.

Plaintiff's employer, real party in interest Cel-A-Pak, Inc., appeals. (An employer, such as Cel-A-Pak, has a direct interest in the unemployment compensation benefits paid to former employees since such benefits are charged against the employer's account which is fed by the

employer's contributions (§ 1026). We will conclude that plaintiff properly was denied unemployment benefits because she had accepted employment with Cel-A-Pak with full knowledge of the Saturday work requirement. When she subsequently refused to perform such work, accordingly, she must be deemed to have left work voluntarily without good cause.

Plaintiff was first employed by Cel-A-Pak in 1966 as a trimmer working at a vegetable packing plant in Salinas. Her employment was seasonal, commencing in April and extending through the following January. Cel-A-Pak employees customarily worked a six-day week from Monday through Saturday, and occasionally on Sundays when the condition and volume of the vegetables so required.

In 1970 plaintiff became a member of the Worldwide Church of God, one tenet of which prohibited working on a Saturday

which is recognized by the church members as a Sabbath day. At this time plaintiff discussed her religious beliefs with her employer, and she was excused from Saturday work during the entire 1970 and 1971 seasons. Apparently, some co-workers complained of plaintiff's "favored" treatment, and prior to the 1972 season Cel-A-Pak advised her that henceforth she, along with all the other employees, would be required to perform Saturday work. Plaintiff agreed to do so and did work each Saturday during the 1972 season.

At the commencement of the 1973 season, Cel-A-Pak posted a notice to all of its employees, stating that "Because of unpredictable weather conditions and the irratic [sic] way in which cauliflower matures, it is necessary for the company to require its employees to work six days a week and occasionally even on Sundays and holidays. Your employer cannot

control mother nature and must maintain its quality standards by harvesting and packing on all days required to by this very perisable [sic] crop." Plaintiff informed her superior that she no longer could work on Saturdays, but she was told that she would not be excused from doing so. Following this discussion, plaintiff worked for three days (none of them a Saturday), became ill and took a 60-day sick leave. She returned on June 11 or 12 and was told that the plant would be operating on Saturday, June 16. Plaintiff informed her supervisor that she would be in church on that day and, when she failed to report for work, Cel-A-Pak replaced her.

Following an administrative hearing, the referee concluded that plaintiff had left Cel-A-Pak voluntarily without good cause, finding that ". . . the claimant accepted employment in 1973, as well as

in 1972, knowing that a condition of the employment required her to work six and perhaps seven days a week . . . . [T]he claimant herein exercised her freedom of choice in accepting a call to work for the 1973-1974 season, being fully aware of the conditions of her employment. She should not now in good faith be permitted to raise her religious convictions as good cause for leaving a job she knew, or should have known, she could not fulfill."

The board adopted the foregoing findings and conclusions.

The trial court, on the other hand, reviewed the administrative record and concluded that the denial of unemployment benefits to plaintiff violated those principles announced by the United States Supreme Court in Sherbert v. Verner (1963) 374 U.S. 398. The trial court found that plaintiff's religious beliefs were bona fide, and concluded that the state could

not force plaintiff, in the court's language, "to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion and work on Saturday on the other hand."

Our analysis of Sherbert v. Verner, supra, however, leads us to a contrary conclusion. In Sherbert, an applicant for unemployment benefits refused, on religious grounds, to accept employment with firms which required Saturday work. Under the applicable South Carolina law, a claimant was ineligible for such benefits if he or she had failed without good cause to accept available suitable work, and the state agency denied benefits on that basis. The high court reversed, holding that the state's ineligibility rule forced the claimant to choose between "following the precepts of her religion and forfeiting benefits, on the one hand,

and abandoning one of the precepts of her religion in order to accept work, on the other hand." (374 U.S. at p. 404.) The court emphasized that since the state's "suitable work" rule had the effect, under the circumstances of Sherbert, of abridging the free exercise of religious beliefs, that rule was invalid unless supported by a compelling state interest. The state's asserted interest in discouraging fraudulent claims for unemployment benefits was held not "compelling."

Sherbert is distinguishable from the present case. In Sherbert the high court examined the circumstances under which a prospective employee refused without good cause "to accept available suitable work." Although California imposes a similar "suitable work" requirement upon claimants (§ 1257), the legality of that statute is not before us. Instead, measuring the constitutionality of section 1256, we

must determine whether plaintiff, having initially accepted employment, thereafter left work "voluntarily without good cause." The public policy underlying section 1256 has been recognized both statutorily and judicially. By denying unemployment benefits to one who has voluntarily terminated employment without good cause, the state promotes a valid purpose in assuring that unemployment benefits are reserved "for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (§ 100; see Zorrero v. Unemployment Ins. Appeals Bd. (1975) 47 Cal.App.3d 434, 439.)

Unlike the situation in Sherbert, the state in the matter before us has not forced plaintiff to choose between her religious principles and her financial needs, as a condition to receipt of unemployment benefits. Under Sherbert,

plaintiff would clearly have been permitted to refuse employment with Cel-A-Pak without risking any loss of unemployment benefits for she would not have rejected "available suitable work." However, plaintiff acceded to Cel-A-Pak's insistence upon Saturday work, served the entire 1972 season on that basis, and commenced the 1973 season knowing of Cel-A-Pak's continued policy requiring Saturday work. The conclusion is inescapable that, in doing so, plaintiff voluntarily assumed employment which she knew would conflict with her religious principles, and thereafter voluntarily quit her employment when the conflict proved unavoidable.

We emphasize the critical difference in the two cases. As illustrated by, and rejected in, Sherbert the condition of work imposed upon the initial employment required an impermissible sacrifice of conscience. In the matter before us, the

condition was knowingly and voluntarily accepted, work commenced, and a change of mind and heart thereafter ensued, doubtless motivated by the very deepest and most sincere of impulses.

Although there are no California cases directly on point, cases from states having comparable statutory provisions have held uniformly that one who knowingly accepts employment involving a condition which subsequently proves unsatisfactory cannot thereafter claim "good cause" for voluntarily terminating that employment because of a later unwillingness to continue to meet the condition. (See Department of Industrial Relations v. Scott (Ala. 1951) 53 So.2d 882, 884; Oliver v. Creamer Heating & Appliance (Idaho 1966) 420 P.2d 795, 799; Friloux v. Administrator, Div. of Emp. Sec. of D. of L. (La. 1962) 136 So.2d 99, 101; In re Sellers (Sup.Ct. N.Y. 1961) 215 N.Y.S.2d

385, 387; Lirakis v. Unemployment Compensation Bd. of Review (Pa. 1961) 168 A.2d 647, 648.) The applicable principles were well expressed in Friloux, as follows: "To constitute good cause the circumstances attending the final termination of the employment must be compelling and necessitous and not merely because the applicant is dissatisfied with conditions that he well knew existed at the time he accepted the employment." (P. 101, italics added.) In other words, an employee cannot ". . . take a job and use that job for the necessary qualifying period of employment, and then, for no reason not present in the first instance, voluntarily quit and receive unemployment insurance benefits." (In re Sellers, supra, 215 N.Y.S.2d at p. 387, italics added.)

While conceding that the foregoing cases do not involve termination of

employment for religious reasons, we conclude that the underlying rationale of those cases is equally persuasive here within a different context. In Stimpel v. State Personnel Bd. (1970) 6 Cal.App.3d 206, 209-210, the issue was the propriety of the absence from work of a state civil service employee because of religious scruples against Saturday employment. The appellate court observed: "[I]f a person has religious scruples which conflict with the requirements of a particular job . . . he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." We conclude that the foregoing principle has similar application to, and force in, the present case within the private sector. After plaintiff voluntarily accepted employment, knowing that the Saturday work condition conflicted with her

religion, she may not thereafter reject the condition, suffer discharge, and receive unemployment benefits charged against the employer's reserve account claiming that she left work with good cause.

In conclusion, we note that section 1256.2, effective January 1, 1976, provides in pertinent part that "An individual who terminates his employment shall not be deemed to have left his most recent work without good cause if his employer operated so as to deprive him of equal employment opportunities because of that individual's . . . religious creed, . . . except that this section shall not apply: [¶] (a) To a deprivation based upon a bona fide occupational qualification . . . ." It has been recently suggested that section 1256.2 "can only be regarded as declaratory of existing rather than new law." (Prescod v. Unemployment

Ins. Appeals Bd. (1976) 57 Cal.App.3d 29, 41, fn. 19.) The parties herein have not discussed the application of section 1256.2 to the present controversy. Assuming, however, that the principles underlying the section applied to a case arising prior to its enactment, nevertheless it seems apparent that the section would not avail a person such as plaintiff who voluntarily and knowingly accepted employment in conflict with his or her religious tenets. Furthermore, it is certainly arguable that Cel-A-Pak's requirement of Saturday work was a "bona fide occupational qualification" under subdivision (a) of section 1256.2, since that requirement was evidently dictated by the perishable nature of Cel-A-Pak's crop. (Although the question of Cel-A-Pak's compliance with the Civil Rights Act of 1964 is not before us, the United States Supreme Court in Trans World

Airlines, Inc. v. Hardison (1977) __U.S. __, __ [45 U.S.L.Week 4672, 4678], recently held that employers are not required by the act's provisions either to incur more than de minimis additional costs in attempting to accommodate the religious preferences of their employees, or to discriminate against some employees in order to enable others to observe a Saturday sabbath.)

In view of our holding herein, we need not consider Cel-A-Pak's further contention that the payment of unemployment benefits to plaintiff under the circumstances in this case would amount to a religious preference prohibited by the constitutional restraint against the establishment of religion. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.)

The judgment is reversed

RICHARDSON, J.

WE CONCUR:

TOBRINER, J., Acting C.J.
CLARK, J.
* SULLIVAN, J.
** TAYLOR, J.
** SIMS, J.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

** Assigned by the Chairman of the Judicial Council.

C O P Y

HILDEBRAND v. UNEMPLOYMENT INS. APPEALS BD.

S.F. 23583

DISSENTING OPINION BY MOSK, J.

I dissent.

Plaintiff was first employed seasonally by the real party in interest, the employer, in 1966. She worked Saturdays as required. Her services were at all times "very satisfactory." In 1970 she became converted to the Worldwide Church of God, which prohibits work from sunset

Friday until sundown Saturday and recognizes Saturday as the Sabbath, a day for religious services. Thereafter, during the 1970 and 1971 seasons plaintiff was excused from Saturday work in order to attend her religious obligations.

Prior to the 1972 season the employer advised plaintiff she would be required to perform Saturday duties, and she complied. Contrary to the implication of voluntariness in the fact recitation of the majority, however, plaintiff did not "agree[d] to do so" (ante, p. ___*). The trial court in its memorandum opinion found that she "did so under protest" and that she complained to her union about the Saturday work requirement. She also contacted the state Fair Employment Practices Commission, to no avail.

Plaintiff refused to work on Saturdays in 1973. Thus we have before us

*Multilith opinion, page 3.

circumstances in which an employee is unable to work on her Sabbath because of religious conviction, adheres faithfully to her beliefs in 1970, 1971 and 1973, but deviates "under protest" during the 1972 season. The majority elevate this aberrant interruption of religious principle to "good cause" for the termination of her employment. I do not agree.

An inference is inescapable from the majority opinion that plaintiff's Saturday work in 1972 significantly reflects upon the sincerity of her religious convictions. My learned colleagues give inadequate consideration to factual finding number 5 of the trial court: "Petitioner's religious beliefs are genuinely held. There is no substantial evidence in the record to support respondents' [California Unemployment Insurance Appeals Board and California Employment Development Department] finding that

petitioner's religious beliefs are not bona fide." Under accepted principles of appellate review, that factual determination is binding upon us.

Therefore this case is controlled by Sherbert v. Verner (1963) 374 U.S. 398. Here, as in Sherbert, "not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." (Id., p. 404.)

This case is also comparable to Montgomery v. Board of Retirement (1973) 33 Cal.App.3d 447 (hg. den.). The petitioner there claimed disability retirement benefits; the county retirement board established that her disability could be eliminated by surgery, which petitioner refused to undergo because of religious faith in divine healing. The court held that "When considerations of conscience grounded upon religious beliefs are involved, the state interest in preserving health pales into insignificance." The denial of benefits was reversed.

Similarly in Syrek v. California Unemployment Insurance Appeals Board (1960) 54 Cal.2d 519, this court reversed a denial of unemployment insurance benefits to an otherwise qualified applicant who maintained a conscientious objection to the then required loyalty oath. Stimpel v. State Personnel Bd. (1970) 6 Cal.App.3d

206, upon which the state places reliance, is distinguishable. There the discharged employee sought reinstatement to employment in which Saturday work was necessary; he could, of course, seek other jobs more compatible with his religious beliefs. Here the plaintiff is not seeking reinstatement, but unemployment compensation because she is presently unemployed.

Though I would still have reservations, it might be arguably possible to justify the theory adopted by the majority in circumstances of one continuous employment relationship. Here, however, we have an atypical job structure. For all practical purposes each season constitutes a separate employment period. Seasonal conditions differ as the crop varies, and as a result working requirements are altered. Thus in the 1970 and 1971 seasons the employer was able to accommodate the plaintiff's declination

to work on Saturdays. The 1972 season apparently provided additional burdens and there were more onerous conditions of employment imposed. As indicated above, for that individual employment period, the plaintiff sacrificed her religious beliefs and worked Saturdays "under protest."

When the next distinct employment season arrived, 1973, and the employer imposed a Saturday working requirement, the plaintiff refused to accept the employment condition. That she did work several days--none of them a Saturday--does not dilute her steadfast refusal, because of religious scruples, to accept the employment as tendered by the employer. Whether between the 1972 and 1973 employment periods her religious dedication had become revived, strengthened or more fervent is a matter of

speculation;[1] the relevant factor is the trial court's finding that her beliefs were bona fide. (People v. Woody (1964) 61 Cal.2d 716, 726.)

Refusal to accept employment under conditions at odds with religious conviction was precisely what the Supreme Court upheld in Sherbert. That the plaintiff may have permitted economic necessity to conquer her conscience in a previous period of employment seems a slender

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[1] The testimony suggests plaintiff's conscience finally prevailed over economic necessity:

"REFEREE: Did you feel you were violating the tenets of your faith by [working Saturdays during 1972]?

"MRS. HILDEBRAND: Yes, yes, and I'm sorry about it. I guess we all break God's commandments.

"REFEREE: Do [sic] you have some sort of conversion there in '73 or so that changed your mind?

"MRS. HILDEBRAND: I just made up my mind that I was going to keep it [the Sabbath].

"REFEREE: No special reason, hm?

"MRS. HILDEBRAND: Well, of course my conscience hurt me.

"REFEREE: Conscience?

"MRS. HILDEBRAND: Yes."

rationale upon which to justify governmental compulsion to subordinate religious convictions in connection with the current seasonal job.

In effect, the state appears to decree that plaintiff now forfeits her right to adhere to religious practices without penalty because of a limited waiver in the past. As the majority concede, there is no authority upholding this novel justification for governmental intrusion into religious liberty. Indeed, the theory not only clearly offends the Sherbert principle, it is contrary to the landmark case of Speiser v. Randall (1958) 357 U.S. 513, which emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, to inhibit or deter the exercise of First Amendment freedoms.

The United States has been unique

among nations of the world in its vindication of the right of individuality in religion. The practices of religion, under our Constitution, are attributes of individual men and women, acting alone or in concert, not of the state or by the leave of the state. To preserve that principle not only should we tolerate no alliance between church and state, we must also be vigilant to prevent overt hostility between church and state. The only acceptable role of the state is to be totally benign in its attitude toward religion and to thus preserve "hospitality to religious diversity" (Trans World Airlines, Inc. v. Hardison (1977) ___U.S. ___, ___, Marshall, J., dissenting).

The denial of benefits which are available to others because of this plaintiff's religious practices constitutes overt hostility to religion and

should not be upheld. I would affirm the judgment of the trial court.

MOSK, J.

FILED: Sept. 15, 1977

ORDER DENYING REHEARING

S.F. No. 23583

IN THE SUPREME COURT OF THE STATE

OF CALIFORNIA

IN BANK

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HILDEBRAND, Plaintiff and Respondent,

v.

UNEMPLOYMENT INSURANCE APPEALS BOARD, et al., Defendants.

CEL-A-PAK, INC., Real Party in Interest and Appellant.

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Respondent's petition for rehearing DENIED.

Bird, C.J., and Mosk, J., are of the opinion that the petition should be granted.

BIRD
Chief Justice

APPENDIX B

[Filed Nov. 8, 1976]

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

TOMMIE ANN HILDEBRAND,

Plaintiff and Respondent,

v.

3 Civ. 15480

(Superior Ct. No. 243588)

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD and CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Defendants,

CEL-A-PAK, INC., a California corporation,

Appellant and Real Party in Interest.

The Unemployment Insurance Appeals Board sustained a decision of its referee disqualifying Tommie Ann Hildebrand, an applicant for unemployment insurance, on the ground that she had left her last job voluntarily without good cause. (Unemp. Ins. Code, § 1256.) The trial court

APPENDIX C

granted the applicant a writ of mandate directing the Board to set aside its decision. Cel-a-Pak, Inc., the applicant's last employer, appeals.

The controversy arises from Mrs. Hildebrand's religiously motivated refusal to work on Saturdays. Cel-a-Pak, the employer, is a seasonal packer of fresh vegetables. Its plant operates from April to January of each year. The harvested produce must be processed while fresh; thus, Cel-a-Pak must operate on many Saturdays during the harvest season. Mrs. Hildebrand went to work in Cel-a-Pak's plant in 1966 and worked each season thereafter. In 1970 she was baptized in the Worldwide Church of God, whose religious tenets prohibit work on Saturday, the Sabbath. She discussed her religious needs with her employer and was accepted for employment during the 1970 and 1971 seasons without reporting for

work on Saturdays. During the 1972 season she acceded to the employer's demand that she work on Saturdays. At the opening of the 1973 packing season she told her employer that she would have to observe the Sabbath; the employer informed her that she would not be given Saturdays off. She went to work on April 9, 1973, worked for three days, took sick, received a 60-day sick leave, returned to work on June 11, and was instructed on Friday, June 15, that the plant would be operating the next day (Saturday) and informed the employer that she would be at church that day. When she failed to report for work the next day, the employer replaced her.

I

In findings adopted by the Appeals Board, the referee noted the presence of evidence tending to establish that the applicant's refusal to work on Saturdays in 1973 was caused by changes in her

financial and social condition rather than by genuine religious conviction. In its own findings the trial court rejected this evidence, declaring: "Petitioner's [applicant's] religious beliefs are genuinely held. There is no substantial evidence in the record to support respondents' finding that petitioner's religious beliefs are not bona fide."

Cel-a-Pak charges the trial court with excess of authority in substituting its own finding of religious sincerity for that of the Appeals Board. It points out that the Appeals Board was in a position to measure Mrs. Hildebrand's credibility and the reviewing court was not, for the latter had only the cold administrative transcript before it.

The scope of appellate review is too narrow to accommodate this charge of error. When as here a trial court exercises independent judgment in reviewing

an administrative transcript, its findings of fact must be accepted on appeal if supported by substantial evidence. (Yakov v. Board of Medical Examiners, 68 Cal.2d 67, 72-73; Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308.) Where opposing inferences of fact may be drawn from nonconflicting evidence, the trial court's inference may be reviewed only by the substantial evidence test. (Lacy v. California Unemployment Ins. Appeals Bd., 17 Cal.App.3d 1128, 1134-1135.)

The sincerity of an individual's religious beliefs is a question of fact. (People v. Woody, 61 Cal.2d 716, 726.) Here the Appeals Board drew one inference from the evidence, the trial judge another. After refusing to work on Saturdays in 1970 and 1971, the applicant did work on Saturdays during the 1972 vegetable packing season. There was evidence that she did so under protest;

that she complained to her local union; that her conscience hurt her for breaking a religious commandment. A minister of her church certified that she was a member and attended church services each Saturday. Despite the Appeals Board's contrary evidence, the trial court could reasonably infer that she performed Saturday work in 1972 only under economic pressure; that eventually her conscience impelled her to assert a positive refusal. Evidence meets the substantial evidence criterion if the fact trier's inference is reasonable. (People v. Kunkin, 9 Cal.3d 245, 250.) The trial judge's inference was undebatably reasonable. We are not a liberty to nullify it in favor of the Appeals Board's contrary inference.

II

Whether undisputed evidence establishes a "voluntary leaving without good cause" is an issue of law, fully available

for appellate review. (Prescod v. Unemployment Ins. Appeals Bd., 57 Cal.App. 3d 29, 38.) The central issue is whether the state violated the First and Fourteenth Amendments and invaded the applicant's free exercise of religion by imposing a penalty for resignation[1] prompted by religious belief.

The issue turns upon Sherbert v. Verner, 374 U.S. 398. In an opinion signed by five justices , the Federal Supreme Court nullified a state unemployment insurance ruling which disqualified a claimant for rejecting suitable work without good cause when her sabbatarian

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[1]On appeal Mrs. Hildebrand argues that she did not resign but was discharged when she failed to appear for Saturday work. Consistently with its own decisions, the Appeals Board held that her unwillingness to work when work was available amounted to a voluntary leaving. We accept that phase of the Appeals Board's ruling. (See Appeals Board Precedent Decisions P-B-144, P-B-37; see also, Boren v. Department of Employment Development, 59 Cal.App.2d 250, 254.)

religious beliefs prompted her to refuse Saturday employment. The majority of the court held that the denial of unemployment insurance burdened the free exercise of religion without a compelling state interest to justify it. It declared that the disqualification "forced her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." (374 U.S. at p. 404.)

In applying the eligibility provisions of the California law, the California unemployment insurance agency and courts are bound by the demands of the First Amendment as authoritatively conceived by the majority opinion in Sherbert v. Verner, supra.

In disqualifying the applicant the Appeals Board postulated a distinction between this case and Verner. The board found that Mrs. Hildebrand had accepted

work for both the 1972 and 1973 seasons knowing that the employer required Saturday work. The Appeals Board decision declares: ". . . if her religious scruples conflicted with the job requirements, she should not have accepted the employment. Having accepted, she should not be heard to complain if she lost her employment because of her refusal to comply with the agreed terms of hire."[2]

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[2]At this point the Appeals Board relied on Stimpel v. State Personnel Bd., 6 Cal. App.3d 206, 209-210. The Stimpel court sustained dismissal of a state employee who declined to work on Saturdays because of his religious faith. The Stimpel opinion distinguished Sherbert v. Verner, declaring arguendo: "We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." (Pp. 209-210.) According to the Stimpel opinion, the employee had worked for the state for approximately one-and-a half years before his superiors demanded Saturday work. Thus the arguendo statement in the Stimpel opinion is not supported by its statement of facts. In any event, Stimpel was not an unemployment insurance case and does not govern here.

The trial court findings do not contradict the Appeals Board finding that Mrs. Hildebrand went to work for Cel-a-Pak in April 1973 with knowledge that Saturday work was required.

Under the California Unemployment Insurance Code, two disqualifications - for rejecting an offer of sutiable employment and for voluntary quitting - turn on the presence or absence of good cause. (Unempl. Ins. Code, §§ 1256, 1257, subd. (b).) As a matter of California law, a good faith, conscientious objection constitutes good cause for rejecting an offer of new employment. (Syrek v. California Unemployment Ins. Appeals Bd., 54 Cal.2d 519, 531; see also, Prescod v. Unemployment Ins. Appeals Bd., 57 Cal.App.3d at p. 40.) Sherbert v. Verner requires the state to recognize a religiously compelled choice as good cause for rejecting a job offer. Here the disqualification was

imposed for a voluntary resignation, not for a rejection of new employment.

We need not decide whether "good cause" is always the same for the purpose of both disqualifications. Our question is more limited - whether any meaningful distinction separates this case from the "good cause" concept established by Sherbert v. Verner.

As applied to an existing employment relationship, Sherbert v. Verner was not designed to promote fraud or malingering (see 374 U.S. at p. 407). We do not construe it to permit an employee to accept work burdened by unpalatable work requirements, then assign those requirements as good cause for quitting. This case escapes such caveats. Cel-a-Pak was a seasonal employer, offering work during the April to January vegetable harvest. From January to April, no employer-employee relationship existed between

Cel-a-Pak and Mrs. Hildebrand. The record does not show whether Mrs. Hildebrand worked for another employer during the brief off-season or whether she drew unemployment insurance. At any rate, each April opening of Cel-a-Pak occasioned the renewal of a previously severed employment relationship. (See Garcia v. California Emp. Stab. Com., 71 Cal.App.2d 107, 111-112; 24 A.L.R.2d 1400.) Had Mrs. Hildebrand refused to go to work for Cel-a-Pak in April 1973, the rule of Sherbert v. Verner would have prevented her disqualification for a refusal of offered new employment.

Although the Appeals Board disqualified Mrs. Hildebrand for resigning from an existing job, the unique circumstances closely paralleled a refusal of new employment. Ordinarily an employer does not accept a work applicant with advance knowledge of the latter's refusal to

conform to job specifications. Here the employer put the applicant to work knowing of her refusal to work on Saturdays. The Appeals Board, in effect, charged the employee with accepting the job under false colors and absolved the employer from offering it under those colors. On the assumption that both parties meant to stick by their guns (an assumption borne out by the events), the renewed employment relationship was doomed from the start. Aside from the delay caused by Mrs. Hildebrand's illness and sick leave, the case more resembles a refusal of proffered employment than a discharge or resignation from an established relationship. We perceive no meaningful distinction between this case and Sherbert v. Verner. As the majority of the federal Supreme Court put the matter, to disqualify this applicant either for refusing a job offer or for resigning would "apply the eligibility

provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." (Sherbert v. Verner, supra, 374 U.S. at p. 410.)

The employer contends that payment of unemployment insurance benefits singles out sabbatarians for special unemployment insurance treatment, thus offending the First Amendment's stricture against laws "respecting an establishment of religion." It is true that the Establishment Clause bespeaks "a government . . . stripped of all power . . . to support, or otherwise to assist any and all religions . . . ." (Everson v. Board of Education, 330 U.S. 1, 11, quoted in Sherbert v. Verner, supra, 374 U.S. at p. 415, separate opinion of Stewart, Jr.; see also, Mandel v. Hodges, 54 Cal.App.3d 596, 610-611.) Nevertheless, the majority in Sherbert v. Verner hold that the state exercises neutrality and does not violate the

Establishment Clause when it pays unemployment insurance to an applicant whose joblessness stems from religious belief. (374 U.S. at pp. 409-410.) We are bound by the latter holding and therefore reject this contention of the employer.

The parties have cited a number of decisions involving claims of religious discrimination in employment arising under title VII of the Civil Rights Act of 1964 (42 U.S.C., § 2000e, et seq.) It is not clear that the California courts must conduct an original, collateral inquiry into the Civil Rights Act whenever an unemployment insurance applicant charges a violation of that act as "good cause" for quitting or refusing work. (See Prescod v. Unemployment Ins. Appeals Bd., supra, 57 Cal.App.3d at pp. 36-37; Warriner v. Unemployment Ins. Appeals Bd., 32 Cal.App.3d 353, 363, dissent of Jefferson, J.) In this case the finding

of good cause is compelled by Sherbert v. Verner, supra, and no inquiry into the Civil Rights Act is necessary.

Judgment affirmed. (CERTIFIED FOR PUBLICATION)

FRIEDMAN Acting P.J.

I concur:

EVANS J.

I concur in the result, being compelled to do so by reason of the holding in Sherbert v. Verner, 374 U.S. 398 [10 L. Ed.2d 965].

REGAN J.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

TOMMIE ANN HILDEBRAND,

Petitioner,

v. No. 243588

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, and CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Respondents;

CEL-A-PAK, INC., a California corporation,

Real Party in Interest.

MEMORANDUM OPINION

The facts show that Petitioner was either discharged or voluntarily quit her employment with Cel-A-Pak because, as a

practicing member of the Worldwide Church of God, she went to church on Saturday instead of working at her regular position. She was denied State unemployment insurance benefits on the theory that she voluntarily quit without good cause. This was upheld by the Referee of the Unemployment Insurance Appeals Board and reaffirmed by the Appeals Board.

Petitioner seeks a Writ of Mandate to obtain her unemployment benefits.

It would appear that the basic reason Petitioner is being denied benefits is that there has been a factual determination by the claims interviewer, the referee, and the members of the Appeal Board that Petitioner did not have a bona fide religious objection to Saturday work.

In People v. Woody, 61 Cal.2d 716 (1964), the Court held that the trier of fact in these cases must inquire into the

question of whether the claimant holds his belief honestly and in good faith or whether he seeks to use religious immunity as a cover for his otherwise illegal activities. Here, the factual determination made was that Petitioner's beliefs, were not honestly held apparently because she worked on Saturdays in 1972, after not working in 1970 and 1971. She did not work on Saturdays in 1973.

In order to challenge an administrative determination, there must be a showing of an abuse of discretion. This abuse arises if the Respondent did not proceed in the manner required by law, the decision had no support by the findings, or the findings were not supported by the evidence. Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110 (1973). Another test articulated by the Courts constituting grounds for interfering with action taken by a

board, is whether the action is "so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." Sanders v. City of Los Angeles, 3 Cal.3d 252 (1970).

The only evidence indicating the lack of a bona fide religious belief for not working on Saturday was the fact that she worked in 1972, despite the fact that she was a member of the church at that time. However, she clearly indicated that she did so under protest, and the referee made no finding as to her economic needs at that time which may have compelled her to work.

In addition, Petitioner did complain to the union and there is an affirmation by her minister which confirms that petitioner was a member of the Worldwide Church of God and attended services each Saturday. Yet, it has been determined that her beliefs were not bona fide.

Respondents contend that there is no distinction between quitting a job and refusing to come to work when work is available. This contention may be correct, but it fails to consider the key point; that is, the imposition of a condition of employment after an employee has been employed which cannot be complied with without the employee either having to choose between his job or his religious beliefs. A condition was imposed in this case which clearly required the employee to choose between following her religious precepts and forfeiting any unemployment benefits or abandoning one of the precepts of her religion and working on Saturdays. See Montgomery v. Board of Retirement, 33 Cal.App. 3d 447 (1973).

Sherbert v. Verner, 374 U.S. 398 (1963) is in point. There an employee was discharged by a private employer for

failing to work on Saturday for religious reasons, and was denied unemployment insurance benefits. Even if it is decided, as the Appeals Board did, that Petitioner voluntarily quit, there is no distinction between voluntarily quitting because of a condition imposed by an employer which would cause the employee to violate his religious beliefs and being discharged for not coming to work while practicing acceptable religious beliefs.

The two-fold test of Sherbert is whether the policy of the Board imposes any burden upon the free exercise of the Defendant's religion, and, if it does, there must be a compelling State interest which justifies it.

As discussed above, it is clear that a burden has been imposed upon Petitioner's free exercise of her religion, and the most important point is whether

Respondent has shown a compelling State interest which justifies it in denying benefits. As Respondent contends, the Supreme Court in Sherbert did not assess the importance of an asserted State interest, but the Court explicitly stated that only "the gravest abuses, endangering paramount interests" would allow a limitation of these important First Amendment rights. In addition, the Court explicitly stated it is to be highly doubtful that the possibility of fraudulent claims by employees, feigning religious objections and causing a dilution of the unemployment fund while interfering with the scheduling of employers, would be sufficient to warrant an infringement of religious liberties. Lastly, the Court held:

> "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the

scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

(Sherbert at p. 972.)

Respondent in essence cites the following problems indicative of a compelling State interest:

1. The financial burden on employers' unemployment insurance accounts.

2. The inquiry that would have to be made by the State into the veracity of religious beliefs, and

3. It would foster excessive entanglement by the State with religion.

As to the first two points, these were deemed insufficient by the Court in Sherbert, supra. As to the last point, the Court stated that the "extension of unemployment benefits to Sabbatarians in

common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences....", and does not violate the Establishment Clause.

Lastly, even though a purely private employer can discharge an employee on religious grounds, the State Unemployment Agency to which he contributes is governed by the First Amendment. Thus, Cel-A-Pak can discharge Petitioner on religious grounds, but the State Unemployment Agency cannot condition payments on purely religious grounds. See Thornton v. Department of Human Resources Development, 32 Cal. App. 3d 180 (1973).

Respondents place great emphasis on Stimpel v. State Personnel Board, 6 Cal. App.3d 206 (1970). This case is clearly and significantly distinguishable. In Stimpel, an employee sought to be

reinstated to his State job. In this case, the employee is seeking unemployment compensation and not reinstatement. Here, Petitioner can only receive unemployment compensation from one source. In Stimpel, the employee could seek other non-Saturday jobs since he sought employment and not unemployment compensation.

The Court has concluded that the withholding of unemployment benefits to Petitioner was in violation of the guidelines stated in Sherbert v. Verner, supra, and that a Peremptory Writ should issue. It is so Ordered. Petitioner to recover her costs.

Dated: April 10, 1974.

/s/ Murle C. Shreck
Judge of the Superior Court

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[Filed May 2, 1975]

IN THE SUPERIOR COURT OF THE STATE

OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

TOMMIE ANN HILDEBRAND, Petitioner, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, and CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, Respondents; CEL-A-PAK, INC., a California Corporation. Real Party in Interest.	No. 243588 [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on March 13, 1974, in Department 16 of the above-entitled court, the Honorable Murle C. Shreck,

Judge, presiding. Petitioner appeared by Richard A. Gonzales, her attorney; respondents appeared by Joseph Garcia, Deputy Attorney General, their attorney; and real party in interest appeared by Richard H. Foster, its attorney.

Said cause having been heard and having been submitted for a decision, the court, having rendered its decision in favor of petitioner and against respondents and real party in interest, now makes the following Findings of Fact and Conclusions of Law:

1. Respondent CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, hereinafter referred to as the Department, is a department of the State of California and is charged by law with the administration of the unemployment insurance program of the State of California. Respondent CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, hereinafter referred to as the

Appeals Board, is a division within the Employment Development Department and, under the provisions of Section 407 of the Unemployment Insurance Code, has the powers of a head of a department as set forth in Section 11180 through 11191 of the Government Code.

2. Real Party in Interest, CEL-A-PAK, INC., is a corporation, organized and existing under the laws of California, with its principal place of business located at 634 South Sanborn Road, Salinas, Monterey County, California.

3. Petitioner was regularly employed by CEL-A-PAK as a trimmer at its place of business at 634 South Sanborn Road, Salinas, California, from July 5, 1966 until June 18, 1973.

4. Petitioner is a member of the Worldwide Church of God. The tenets of her faith require that she perform no work on Saturday and that she attend

church services on that day.

5. Petitioner's religious beliefs are genuinely held. There is no substantial evidence in the record to support respondents' finding that petitioner's religious beliefs are not bona fide.

6. In accordance with her religious beliefs, petitioner advised her employer on Friday, June 15, 1973, that she would be unable to work the following day, Saturday, June 16, 1973. She attended church services instead. Petitioner reported to work as usual on Monday, June 18, 1973, and was advised by her employer that her employment had been terminated by virtue of her failure to report to work on June 16, 1973.

7. Thereafter, on June 20, 1973, petitioner filed a claim for unemployment insurance benefits at the office of respondent Department located at Salinas, California, where she duly registered for

employment. Petitioner was able and available for work, and conducted a suitable search for work in accordance with instructions given by agents of the said Department to which she continued to report weekly thereafter.

8. Petitioner was paid wages while employed by CEL-A-PAK, INC., sufficient to qualify her for unemployment insurance benefits, and petitioner qualified for said benefits in all respects.

9. Nevertheless, on July 5, 1973, an examiner of the Department disqualified petitioner from receiving unemployment insurance benefits for the following reasons: that she had voluntarily quit her employment with CEL-A-PAK, INC., because she was required to work Saturdays; and that her refusal to work Saturdays for religious reasons was not good cause to quit her employment. Petitioner was notified of the decision

of disqualification on July 5, 1973.

10. Petitioner filed an appeal from said decision on July 6, 1973. The appeal was heard by a referee, Anthony Schmidt, at a hearing on October 24, 1973. Said referee affirmed the disqualification by his decision, dated October 30, 1973.

11. Thereafter, within ten days after said decision was mailed by the referee, petitioner appealed the decision of the referee to respondent Appeals Board. The Appeals Board issued its decision affirming the referee's decision and denying petitioner's claim, and notified petitioner thereof on January 10, 1974.

12. Petitioner was either discharged or voluntarily quit her employment with CEL-A-PAK because, as a practicing member of the Worldwide Church of God, she went to church on Saturday instead of working at her regular position.

13. The denial of unemployment compensation benefits forces petitioner to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion and work on Saturday on the other hand.

14. No compelling state interest has been shown by respondents to justify the denial of benefits to petitioner who refused, for religious reasons, to work on Saturdays.

CONCLUSIONS OF LAW

1. In order to overturn an administrative determination, the petitioner must show an abuse of discretion which arises where the administrative agency does not proceed in the manner required by law, or where the decision has no support by the findings, or where the findings were not supported by the

evidence (Selby Realty Co. v. City of Buenaventura, 10 Cal.3d 110 (1973)), or where the administrative decision is "so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." (Sanders v. City of Los Angeles, 3 Cal.3d 252 (1970)).

2. Respondents abused their discretion in finding that petitioner's beliefs were not genuinely held.

3. The state may not impose a condition on the receipt of unemployment benefits which places a burden upon the free exercise of the petitioner's religion. Sherbert v. Verner, 374 U.S. 398, 405 (1963), Montgomery v. Board of Retirement, 33 Cal.App.3d 447 (1973).

4. The state may not constitutionally apply the eligibility provisions of its unemployment compensation program so as to constrain a worker to abandon his or her religion. Sherbert v. Verner,

374 U.S. 398, 410 (1963).

5. Denial of benefits to petitioner who refused, because of religious beliefs, to work on Saturdays may be justified only by the showing of a compelling state interest. Sherbert v. Verner, 374 U.S. 398, 407-408 (1963).

6. There is no distinction between voluntarily quitting because of a condition imposed by an employer which would cause the employee to violate his or her religious beliefs and being discharged for refusing to work while practicing acceptable religious beliefs. Sherbert v. Verner, 374 U.S. 398 (1963).

7. The withholding of unemployment compensation benefits to petitioner was in violation of the guidelines set forth in Sherbert v. Verner, 374 U.S. 398 (1963); accordingly, the decision of the respondents must be overturned and

petitioner's claim for benefits should be granted.

Let judgment be entered accordingly.

Dated: May 2, 1975

/s/ Murle C. Shreck

Judge of the Superior Court

[Filed May 20, 1975]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

TOMMIE ANN HILDEBRAND,

Petitioner,

v. No. 243588

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, and CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS

Respondents;

CEL-A-PAK, INC., a California Corporation,

Real Party in Interest.

This matter came regularly before this Court on March 13, 1974, for hearing. Richard A. Gonzales appeared as

APPENDIX F

attorney for petitioner, Joseph Garcia appeared as attorney for respondent and Richard H. Foster appeared as attorney for real party in interest. The record of the administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented, and the Court having made findings of fact and conclusions of law, which have been signed and filed,

IT IS ORDERED that:

1. A peremptory writ of mandamus shall issue from this Court, remanding the proceedings to respondent and commanding respondent to set aside its decision dated January 10, 1974, in the administrative proceeding entitled Tommie Ann Hildebrand v. Cel-A-Pak, Inc. No. 73-7616 and to reconsider its action in light of this Court's findings of fact

and conclusions of law, and to take any further action specially enjoined upon it by law; but nothing in this judgment or in that writ shall limit or control in any way the discretion legally vested in respondent.

2. Petitioner shall recover costs in this action in the amount of $60.30.

Dated: May 20, 1975

/s/ Murle C. Shreck
Judge of the Superior Court

Judgement entered on 5-20, 1975.

W.N. Durley, Clerk

By Linda Stephens
Deputy Clerk

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DECISION OF THE REFEREE

In the Matter of

Tommie Hildebrand
104 Bernal Drive
Salinas, CA 93901

Claimant-Appellant
SSA No. 466-22-6729

Cel-A-Pak
634 S. Sanborn Road
Salinas, CA 93901

Employer
Account No. 143-4486

SAN JOSE REFEREE OFFICE
Case Number:
SJ-15800 and
SJ-16335

Date Appeal to Referee Filed:
July 6, 1973
(SJ-15800)
September 11, 1973
(SJ-16335)

Time and Place of Hearing:
October 24, 1973
Salinas, CA

Parties Present:
Claimant
Employer

STATEMENT OF FACTS

The claimant appealed determinations which held her:

(1) Disqualified from receiving unemployment insurance benefits under code section 1256 beginning June 17, 1973 and continuing until she has earned at least $305 in subse-

quent bona fide employment on the ground she left her most recent work voluntarily without good cause; and

(2) Ineligible for benefits under code section 1260(a) on the ground she had not removed the disqualification previously imposed under section 1256.

A ruling was issued which relieved the employer's account of benefit charges.

The above employer is engaged in the food processing business at Salinas, California. Its work is generally of a seasonal nature, extending from April through January. Its operations are usually seven days a week.

The claimant herein has been employed by this employer for about seven seasons. She usually worked the days and hours re-

quired of her job until October or November 1970, a time when she embraced the tenets of a religious organization which observed Saturday as its Sabbath. The claimant was given permission to be absent from work during the 1970-1971 season so that she could observe her Sabbath on Saturdays. During that packing season other employees, who were required to work every Saturday, complained to the employer of the special privilege granted to the claimant. In order to maintain the morale of its workers, the employer thereafter made it clear to every employee that a condition of the employment was that the employees must be willing to work any and all days of the week when the plant is producing. The claimant accepted this condition and worked all workdays, including Saturdays, until the 1972-1973 season ended in

January 1973.

All employees were advised that the same policy was continued for the 1973-1974 season, which began on April 6, 1973. The claimant began the season as usual on or about April 9 and worked for three days, after which she requested and received a 60-day leave of absence because of alleged illness. The claimant returned to work on June 11 and was told on Friday, June 15, that the plant would be operating on Saturday, the 16th. The claimant objected, stating that she intended to attend church services on Saturday.

When the claimant did not report for work on June 16, an official of the company called to learn her whereabouts. He was told by the claimant that she did not intend to work that day because it was her Sabbath day. She also made it clear

that she had no intention of working any Saturday thereafter. She was then told that it would be necessary to replace her because the company required the services of a person who was willing to work the normal work schedule. When the claimant indicated she would not work on Saturdays, the employer immediately obtained a replacement that same day.

The claimant reported for work on Monday, June 18. Shortly after starting her work she was told by a co-worker that her employment had been terminated.

The claimant had been an excellent worker and the employer would have continued to employ her if she were willing to work the normal workweek. The claimant testified that she conscientiously objected to the Saturday work. She further testi-

fied that she had worked on Saturday during previous years while a member of her present church because her situation made it necessary for her to do so.

Shortly after the claimant was disqualified from receiving unemployment insurance benefits, a former co-worker paid the claimant about $350 for doing some housekeeping and for painting his house for him. The claimant's work was not supervised, and the claimant's friend paid her what he thought the work was worth. Although the claimant had done some housekeeping and house painting for her former husband, she was never employed outside the home in either of those occupations.

REASONS FOR DECISION

Section 1256 of the California Unemployment Insurance Code provides that an

individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges, if the claimant left his most recent work voluntarily without good cause or he has been discharged for misconduct connected with his most recent work.

In Precedent Decision P-B-37 the California Unemployment Insurance Appeals Board held that in determining whether there has been a voluntary leaving or discharge under code section 1256, it must first be determined who was the moving party in the termination. If the claimant left employment while continued work was available, then the claimant is the moving party. On the other hand, if the employer refuses to permit an individual to continue working although the individual is ready, willing and able to do so,

then the employer is the moving party.

In the present case the claimant was an excellent worker and the employer wished to continue the claimant's employment after June 16, 1973. There was work available for the claimant if she had been willing to work. Since she refused to accept such work, the claimant is the moving party and the issue is whether the claimant left her employment voluntarily with good cause.

The California Unemployment Insurance Appeals Board held in Precedent Decision P-B-27 that there is good cause for the voluntary leaving of work where the facts disclose a real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

The Appeals Board further held in Benefit Decisions 5059 and 5742 that an employee's refusal to work the normal workdays required of his occupation violates a condition of the employment contract and does not constitute good cause for leaving work.

The Appeals Board recognized in Benefits Decision 5775, however, that refusal to work the days required by an employer may result in a leaving of work with good cause where such leaving is based upon genuine religious scruples. In that case the claimant had worked as a secretary for four days without being required to work on Saturday, her Sabbath day. The Appeals Board found that the employer's requiring her to work Saturdays thereafter was an unreasonable modification of the employment contract for this claimant and constituted good cause for her leaving.

The United States and the California Supreme Courts have considered the constitutional guarantee of freedom of religion contained in the First and Fourteenth Amendments to the Constitution as such guarantees apply to an individual's unemployment insurance rights. Both jurisdictions have held that the state if prohibited by the First Amendment from administering its unemployment insurance laws in such a way that it interferes with or prohibits the free exercise of one's religion.

In Sherbert v. Verner (1963) 374 U.S. 398, 83 S.Ct. 1790, the U.S. Supreme Court held that: The (State's) ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of her religion in order to accept work, on the other hand. Governmental imposi-

tion of such a choice puts the same kind of burden upon the free excercise (sic) of religion as would a fine imposed against appellant for her Sunday worship."

In People v. Woody (1964) 61 Cal. 2d 716, 40 Cal. Rptr. 69, the California Supreme Court recognized the principle established in Sherbert v. Verner and added: "Although the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the First Amendment is not so rigid."

The Appeals Board also upheld the guarantees of religious freedom in Precedent Decisions P-B-1 and P-B-17 where such freedom is brought into question by the application of code section 1253(c) regarding one's availability for Sabbath work. In P-B-17 the Board cited that part

of the decision in Sherbert v. Verner which stated: ". . . nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment."

The Appeals Board concluded therefrom that a claimant cannot raise his religious convictions as a defense to any requirement of the Unemployment Insurance Code unless the conviction is based upon genuine religious belief.

There is some evidence in the instant case that the claimant's refusal to work on Saturdays was not based upon any geniune conscientious objection. She had worked on Saturdays for a long time despite her church's teachings. Her refusal to work Saturdays during the 1973-1974

season was based upon the fact that her financial or social situation had changed.

While the evidence might not establish that the claimant's refusal to work Saturdays was based upon any geniune religious conviction, the referee does not base his decision solely upon that finding. It is perfectly reasonable and logical to accept the fact that a person's conscience may cause him to return to the established tenets of his religion even after having abandoned the practice of such tenets for a long period of time.

The fact that distinguishes this case from any of those cited above is that the claimant accepted employment in 1973, as well as in 1972, knowing that a condition of employment required her to work six and perhaps seven days a week. Unlike

the situation in Benefit Decision 5775, the claimant herein exercised her freedom of choice in accepting a call to work for the 1973-1974 season, being fully aware of the conditions of her employment. She should not now in good faith be permitted to raise her religious convictions as good cause for leaving a job she knew, or should have known, she could not fulfill.

It is concluded the claimant left her most recent work voluntarily without good cause within the meaning of code section 1256.

Code section 1260(a) provides that an individual disqualified under section 1256 is ineligible to receive unemployment benefits until he has, subsequent to the act that caused his disqualification and his registration for work, performed

services in bona fide employment for which remuneration is received equal to or in excess of five times his weekly benefit amount.

The Appeals Board held in Precedent Decision P-B-5 that in deciding if employment is bona fide the following factors should be considered: (1) the character of employment; (2) the method of obtaining employment (3) the wage paid; (4) the wage last received by the claimant in his customary occupation; (5) relationship between the employment and the regular course of the employer's business; (6) relationship between the employment and the claimant's customary occupation; (7) the claimant's willingness to accept future employment of the same kind and under the same conditions.

Although the claimant herein was paid approximately $350 subsequent to her separation from the employment of the above employer, such remuneration was not compensation paid to her for service performed in bona fide employment.

The services were performed for one of the claimant's co-workers who was aware of the claimant's being disqualified from receiving benefits due to the circumstances of her separation from work. The work was performed at the claimant's convenience and she was paid only what the friend thought the work was worth. Although the claimant had done housecleaning and painting for her former husband, she had never been employed in the occupation of a housekeeper or painter. The claimant's friend was not engaged in any business involving painting or custo-

dial work, and the claimant has given no indication that she would pursue this line of work in the future.

It is concluded the claimant has not been paid remuneration equal to or in excess of five times her weekly benefit amount subsequent to her being disqualified under code section 1256.

DECISION

The determinations and ruling are affirmed. Benefits are denied, as provided in the determinations. The employer's reserve account is relieved of benefit charges.

ANTHONY SCHMIDT, Referee

SJ-15800 and SJ-16335

BEFORE THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of: BENEFIT DECISION

Case No. 73-7616

TOMMIE HILDEBRAND
(Claimant)
104 Bernal Drive
Salinas, California

S.S.A. No. 466-22-6729

CEL-A-PAK
(Employer)
634 South Sanborn Road
Salinas, California

Employer Account No. 143-4486

The claimant appealed from that portion of Referee's Decision Nos. SJ-15800 and SJ-16335 which held that the claimant was disqualified for benefits under section 1256 of the Unemployment Insurance Code and that the employer's reserve account was relieved of benefit charges under section 1032 of the code. We have consid-

ered the written argument which has been submitted.

We adopt the referee's statement of facts and reasons for decision.

In written argument counsel for the claimant contends that the claimant did not voluntarily leave her work but was discharged. However, the claimant's refusal to comply with the employer's request that she work on Saturdays shows that she was not ready, willing and able to work. That unwillingness on the part of the claimant to work when continued work was available constitutes a voluntary leaving of work (Appeals Board Decision No. P-B-144).

In Stimpel v. State Personnel Board (1970), 85 Cal.Rptr. 797, the appellant was a construction inspector employed by the State of California. When hired he told the employer he was a Seventh Day Adventist and could not work from

sunset Friday to sunset Saturday. He was told this would not be acceptable because Saturdays were workdays and inspectors were needed. For a period of time he worked with other employees taking his place on Saturdays. He was then told this situation could no longer be tolerated, and after a period of unauthorized absence from work was deemed "an automatic resignation from state service." He sought reinstatement which was denied. In affirming that denial the Court distinguished Sherbert v. Verner on the ground that the employee could receive unemployment compensation benefits only from the State. There were no alternative sources whereas Stimpel had other sources of employment which would not require Saturday work. But, of significance insofar as the instant case is concerned is the following statement of the Court:

"The proliferation of religions with an infinite variety of tenants would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties."

Although the instant case involves a private employer, we see no basis for making a distinction on that ground. The claimant accepted the condition of employment that she be willing to accept work on all days when the plant was in operation and, in fact, did so for the entire

1972-1973 season ending in January 1973. She also accepted the condition for the 1973-1974 season starting in April but then changed her mind and decided not to work from sundown Friday to sundown Saturday. As stated by the Court in Stimpel, if her religious scrupeles conflicted with the job requirements, she should not have accepted the employment. Having accepted, she should not be heard to complain if she lost her employment because of her refusal to comply with the agreed terms of hire.

The appealed portion of the decision of the referee is affirmed. Benefits are denied as provided in the referee's decision and the employer's account is relieved of charges.

DON BLEWETT

CARL A. BRITSCHGI

JOHN B. WEISS

73-7616

BEFORE THE CALIFORNIA UNEMPLOYMENT

INSURANCE APPEALS BOARD

In the Matter of: BENEFIT DECISION

TOMMIE HILDERBRNAD
(Claimant) Case No. 73-7616-A
104 Bernal Drive
Salinas, California

S.S.A. No. 466-22-6729

CEL-A-PAK
(Employer)
634 South Sanborn Road
Salinas, California

Employer Account No. 143-4486

On January 10, 1974 we issued a decision in the above entitled matter [Benefit Decision No. 73-7616] in which we affirmed that portion of Referee's Decision Nos. SJ-15800 and SJ-16335 which held that the claimant is disqualified for unemployment insurance benefits under section 1256 of the Unemployment Insurance Code and that the employer's reserve account is relieved of

benefit charges under section 1032 of the code.

Thereafter the claimant filed a mandamus proceeding in the Superior Court of the State of California in and for the County of Sacramento, Case No. 243588, requesting the court to require that we vacate and set aside our decision holding the claimant disqualified under section 1256 and determine that the claimant is entitled to unemployment insurance benefits.

After a hearing before the court the Honorable Murle C. Shreck, Judge of the Superior Court, signed the Peremptory Writ of Mandamus ordering this board to vacate and set aside its decision in Case No. 73-7616 and to issue a new decision in light of the court's findings of fact and conclusions of law.

Accordingly, in accordance with the decision of the court, we hereby set aside our decision in Case No. 73-7616. We now

hold, as ordered, that that portion of Referee's Decision Nos. SJ-15800 and SJ-16335 from which the claimant appealed is reversed. The claimant is not disqualified for benefits under section 12256 of the code and the employers reserve account is subject to benefit charges under section 1032 of the code.

EUING HASS

DON BLEWETT

CARL A. BRITSCHGI

73-7616-A

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND,
Petitioner,

vs.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, INC., a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT CEL-A-PAK IN OPPOSITION

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January 25, 1978

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A BOWNE COMPANY

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND,
Petitioner,

VS.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, INC., a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

---

BRIEF FOR RESPONDENT CEL-A-PAK IN OPPOSITION

OPINIONS BELOW

The opinions below are set forth in the appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is there a case or controversy?

2. Is the action of the California Employment Development Department in denying the petitioner benefit payments for voluntarily accepting and then rejecting Saturday work against the constitutional prohibitions of *Sherbert v. Verner,* 374 U.S. 398, 10 L.Ed.2d 965?

3. Would requiring employers to grant the special privilege of Friday evening and Saturday work absences violate the establishment clause of the Constitution?

STATEMENT

The procedural history of the case is adequately set forth in the Petition. The Supreme Court, however, should be aware that the petitioner has already received her unemployment insurance benefits and under California law, as hereinafter appears, the State has no right to get them back.

The employer's reserve account, as far as respondent knows, has been charged despite the decision of the California Supreme Court which held to the contrary. Respondent has sought, without success, to have either the Attorney General's Office of the State of California or the California Employment Development Department clarify this situation. At the present time, however, the only official notice that respondent has received is that contained in the decision of the California Unemployment Insurance Appeals

Board set forth at page 92a of the appendix to the Petition.

ARGUMENT

I.

THERE IS NO CASE OR CONTROVERSY

There is no more basic rule than that the Supreme Court does not give advisory opinions on constitutional questions. In the instant case, we do not believe that there is any case or controversy.

Under California law, once the Appeals Board has made its decision, an applicant is not liable for paid benefits despite any further appeal. The California Unemployment Insurance Code provides in pertinent part as follows:

> "§ 1376. *Overpayment determination; notice.*
>
> "The Director of Employment Development shall determine the amount of the overpayment and shall notify the liable person of the basis of the overpayment determination. In the absence of fraud, misrepresentation, or willful nondisclosure, notice of the overpayment determination shall be mailed or personally served not later than one year after the close of the benefit year in which the overpayment was made."

> "§ 1379. *Recovery of overpayments; civil action; offset.*
>
> "The Director of Employment Development, subject to the provisions of this article, may do any or all of the following in the recovery of overpayments of unemployment compensation benefits:

(a) File a civil action against the liable person for the recovery of the amount of the overpayment within one year after any of the following:

(1) The mailing or personal service of the notice of overpayment determination if the person affected does not file an appeal to a referee.

(2) The mailing of the decision of the referee if the person affected does not initiate a further appeal to the appeals board.

(3) The date of the decision of the appeals board.

(b) Offset the amount of the overpayment received by the liable person against any amount of benefits to which he may become entitled under this division within any of the following periods:

(1) The current disability benefit period.

(2) The current benefit year.

(3) Any benefit year which begins during the three-year period next succeeding the date of the mailing or personal service of the notice of overpayment determination.

(4) One year from the beginning date of any disability benefit period which begins during the three-year period next succeeding the date of the mailing or personal service of the notice of overpayment determination."

"§ 1380. *No recovery if determination affirmed; when employer's experience rating account not charged.*

"No person shall be liable for the amount of benefits received where the benefits were paid pursuant to a referee's decision which affirmed an initial determination or in accordance with a final decision of the Appeals Board, regardless of any further appeal. An employer's experience rating account shall not be charged with any benefits erroneously or unlawfully paid."

As the petitioner admits on page 13 of the Petition, after the Superior Court decision in this case the Appeals Board ordered that petitioner's benefits be paid. Although the date of this decision does not appear in the appendix to the Petition, we can inform the Court that this decision was reached on July 3, 1975—over a year before resort was had to this Court.

There is, of course, no indication that any attempt has been made by the State to file any action for recovery of any alleged overpayment under Section 1379. Obviously, under the provisions of the California Unemployment Insurance Code, no recovery is possible because of the time period involved and because Section 1380 denies liability for benefits received in accordance with the final decision of the Appeals Board "regardless of any further appeal."

The petitioner is simply asking the Court for an advisory opinion telling her that she was right in her apparently religiously-motivated actions. She has already received her unemployment benefits and the State cannot recover them. If petitioner's counsel, the California Rural Legal Assistance group, or any of the agencies established under the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., have any interest in encouraging the tenets of the World Wide Church of God, it is suggested that a more appropriate method be adopted than this case. We should remind the

Court of the various remedies under Title VII of the Civil Rights Act, *supra.*

We should also advise the Court that an action was instituted in the United States District Court, Northern District of California, under that Act's provisions entitled "Tommie Ann Hildebrand, Plaintiff, v. Cel-A-Pak, a California corporation, Defendant," action No. C-74-0414 WHO, in which United States District Judge William H. Orrick held that the defendant did not violate Title VII of the Act. The time for appeal has expired in that case.

Perhaps the possibility still exists, however, that the California Rural Legal Assistance group could commence an action in the United States District Court against the State of California with respect to the State's unemployment insurance policy. However, this action, too, would in Mrs. Hildebrand's case be subject to the objection that she has received all of her benefits and since the State cannot get them back, there is no case or controversy.

The interest of petitioner in the status of Cel-A-Pak's reserve account would seem to be academic unless she intends in some way to ask the Supreme Court to punish the employer for resisting her efforts to obtain unemployment benefits. To countenance this desire would seem to us inappropriate.

The California Department of Justice has informally advised us that it intends to request this Court to accept certiorari in this case. We must advise the Court that the only formal action which was taken by the California Employment Development Depart-

ment is contained at page 92a of the appendix to the Petition. The reserve account of respondent Cel-A-Pak was charged pursuant to the order of the California Unemployment Insurance Appeals Board. Although we informed the Appeals Board of the California Supreme Court's decision and requested remedial action, we have been ignored.

Since we have not received any official or unofficial communication of the California Department of Justice's claims in this matter, we find it difficult to advise the Court with respect to the Department's position. Apparently, however, the Department of Justice is going to suggest to this Court that both the State Supreme Court and the Appeals Board were wrong in their decisions. We will not comment on the appropriateness of a State department questioning the decisions of the State judiciary before this Court. We do not understand, however, how an action can be instituted in the Supreme Court of the United States to charge Cel-A-Pak's reserve account, particularly in view of the fact that it has already been charged. If the State Department of Justice wants monies from Cel-A-Pak, it would seem appropriate to utilize the State rather than Federal Courts for this purpose.

We cannot help but observe that the Supreme Court of the State of California has already decided against the State in this respect. Furthermore, under Section 1380 of the California Unemployment Insurance Code, our reserve account was improperly charged in the first place since under the terms of that section

where there has been a final decision of the Appeals Board there is no liability regardless of any further appeal.

If this Court is as confused as we are as to the status of Cel-A-Pak's unemployment reserve account and what the State proposes to do about it, we suggest that the Court request the State of California to clarify the matter since we have tried to do so, without success.

II.

SHERBERT v. VERNER IS DISTINGUISHABLE

Petitioner's principal ground for asking this Court to accept this case is that the decision of the California Supreme Court is in conflict with *Sherbert v. Verner,* 374 U.S. 398, 10 L.Ed.2d 965. In our opinion, the *Sherbert* case is readily distinguishable from the situation here.

In *Sherbert,* the State was affirmatively insisting that the recipient of unemployment benefits should actively search for employment in establishments which had Saturday work in violation of his religious convictions. Here, no one asked Mrs. Hildebrand to go to work for Cel-A-Pak, which she knew had a six-day week including Saturday and Friday night work. She was well aware of the necessary restrictions on her religious observance when she commenced work for the 1973 season.

In the prior season, the employer had served notice, and Mrs. Hildebrand had acquiesced, that she was not

to receive any different consideration than that received by the company's other employees. We believe that the Court can take judicial notice that many, many opportunities exist for working a five-day week, not including Saturdays.

In *Sherbert,* the Unemployment Commission was insisting on pain of denial of benefits that the applicant actively seek Saturday work. Here, all that is required is that Mrs. Hildebrand seek work in other establishments which do not work on Saturdays rather than require Cel-A-Pak and its employees to give her a special privilege because of her day of religious observance.

We think the Court can take judicial notice that Friday is a day of religious observance also by followers of the Prophet Mohammed. In addition, the Buddhists have as a holy day a different day of the week. If the special privilege accorded to Mrs. Hildebrand is required by law, so also would the followers of other religions who had different requirements as to different days be entitled to special treatment.

It is obvious that requiring a schedule of work to satisfy the days of religious observance of all the many and varied religions and sects would be unreasonable and oppressive and render the employer unable to construct a workable work plan.

III.

IF THE COURT GRANTS CERTIORARI IT SHOULD CONSIDER THE ESTABLISHMENT CLAUSE

For the reasons we have heretofore advanced, we do not think certiorari is appropriate in this case. However, if the Court decides to the contrary, then we believe the Court is required to consider the impact of the establishment of religion clause of the Constitution. The Court will recall that in *Trans World Airlines, Inc. v. Hardison,* 53 L.Ed.2d 113, the establishment clause was not considered by the Court because of its construction of the civil rights statute, *supra.* However, in this case, no federal statute is involved and the question necessarily arises as to whether giving Mrs. Hildebrand the special privilege of Friday evening and Saturday work absences constitutes a special preference for her religion over the rest of the employees of Cel-A-Pak.

The Supreme Court, in holding that a Sunday closing law could be upheld, indicated that a Sunday closing day is not to aid religion but only to set aside a day of rest—a legitimate secular end. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393. Here, no one contends that the special privilege of Saturday absence serves any secular end other than to encourage Mrs. Hildebrand and her co-religionists in the observance of their religion. *See, also, Everson v. Board of Education,* 330 U.S. 1 at 15; *School District v. Schempp,* 374 U.S. 203, 10 L.Ed.2d 844. In *Schempp,* it was conceded that government preference of one religion over another was prima facie violation of the establishment clause. Here, by allowing those who

adhere to the World Church of God a four and one-half rather than a six-day week, the State would actually encourage this church by its creation of special privilege.

We are not prepared to say that a reasonable accommodation to the religious needs of employees may not in some instances be permitted by the establishment clause. One or two or possibly even more days a year allowed for religious reasons does not particularly trouble us. However, in this case, Mrs. Hildebrand is asking for up to 25 percent of the work week. The Court will note that her religious observance extends from 5 o'clock p.m., Friday, to 5 o'clock p.m., Saturday. Since the harvest sometimes necessitates Friday night work, this would constitute about one and one-half days of work out of the week. *Compare Trans World Airlines, Inc. v. Hardison, supra.*

The encouragement of this special privilege by the State seems to us obviously to be an active advancement of a particular religion, which is forbidden by the Constitution. However, even more important, we cannot see that the denial of a special privilege not accorded to other employees can in any way be a denial of religious liberty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 25, 1978.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND,
Petitioner,

vs.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, INC., a California corporation,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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In the Supreme Court
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TOMMIE ANN HILDEBRAND,
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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PRELIMINARY STATEMENT

Respondent California Employment Development Department[1] fully supports the petition herein. Re-

[1]Respondent California Employment Development Department is hereinafter referred to as "Respondent Department."

spondent Department did not appear in this litigation beyond the California Superior Court level, because it was convinced that the Superior Court was correct in holding that *Sherbert v. Verner* (1963) 374 U.S. 398 controlled this case. Respondent Department is equally convinced that the California Supreme Court erred when it refused to apply *Sherbert* to this case and instead grafted a concept of "waiver" to the First Amendment right to freely exercise religious beliefs. As the state agency charged with the administration of the Unemployment Insurance system in California, Respondent Department is required in all similar unemployment insurance eligibility decisions to apply this "waiver" concept as expressed by the California Supreme Court. For these reasons, Respondent Department feels that it is imperative that the Petition for Writ of Certiorari be granted.

JURISDICTION

The California Supreme Court has decided a federal question of substance in a manner inconsistent with applicable decisions of this Court. Respondent Department therefore invokes this Court's jurisdiction under 28 U.S.C. 1257(3) and U.S. Supreme Court Rule 19.

QUESTION PRESENTED

Whether, in light of this Court's holding in *Sherbert v. Verner,* the denial of unemployment insurance

benefits to a Sabbatarian whose loss of employment was solely due to her refusal to work on her Sabbath, unconstitutionally burdens her First Amendment rights to the free exercise of religion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

To avoid repetition, Respondent Department respectfully refers the Court to the constitutional and statutory provisions cited in the Petition, pages 3 and 4. To these Respondent Department would add the following:

Section 1257 of the California Unemployment Insurance Code provides in part as follows:

> "An individual is also disqualified for unemployment compensation benefits if:
>
> * * *
>
> "(b) He, without good cause, refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by a public employment office."

Section 1522 of the California Unemployment Insurance Code provides as follows:

> "The Unemployment Fund shall be administered by the director exclusively for the purposes of this division without liability upon the part of the state beyond the amounts paid into and earned by the fund."

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Again, to avoid repetition, Respondent Department respectfully refers the Court to petitioner's statement of the case, and description of the proceedings below.

REASONS FOR GRANTING THE WRIT

Respondent submits that the California Supreme Court has by its decision below, seriously undercut the right of workers in California to exercise their religious freedoms. The Court's decision is not in accord with the applicable decisions of this Court, and if allowed to stand, will require Respondent Department to disqualify from receipt of unemployment insurance benefits California workers who feel bound to follow sincerely held religious convictions.

I

THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT HAS NO COMPELLING INTEREST WHICH WOULD JUSTIFY THE DENIAL OF UNEMPLOYMENT INSURANCE BENEFITS TO A CLAIMANT WHO QUIT HER JOB BECAUSE OF AN ACTUAL CONFLICT BETWEEN HER WORKING CONDITIONS AND HER BONA FIDE RELIGIOUS BELIEFS.

Respondent Department has an interest, a substantial interest, in protecting the Unemployment Insurance Fund from false, fraudulent, or invalid claims. The Director of the Department is charged by statute with the duty of administering the California Unemployment Insurance Fund. Section 1522. The Director is also responsible for determining whether a claimant for unemployment insurance benefits is disqualified because he or she left his or her most recent work "voluntarily without good cause". Section 1256. However, Respondent Department's interest would not have been violated in this case by the granting of benefits to petitioner. Respondent Department's interest can also be protected in all other similar cases without the adoption of a rule which denies unemployment insurance benefits to claimants because they may have permitted economic necessity in a previous period of employment to conquer their sincerely held religious beliefs.

A

The interests of Respondent Department would not be adversely affected by the granting of benefits to petitioner.

Respondent Department and the Unemployment Insurance Fund are only adversely affected when unemployment insurance benefits are paid as a result of a claim which is in fact, false, fraudulent, or otherwise invalid. Petitioner's claim was none of these.

All three California courts which have heard this case agreed that petitioner's religious belief was sincere. Moreover, petitioner was following a clear doctrine of her church. That doctrine conflicted with the employment conditions established by her employer. She had held that belief for three years and her employer had accommodated her belief for two years by not requiring her to work on Saturday.

When her employer later refused to continue this accommodation, she continued working only "under protest" while waiting for her union to resolve the ongoing dispute. Petitioner had made her employer aware of the conflict between his demands and her belief and attempted to resolve the problem prior to the end of her employment.

Although employees of Respondent Department originally decided that petitioner's belief was not bona fide because she acceded to her employer's demands to work on her Sabbath, Respondent Department subsequently rejected that determination. Upon review of the record and the Superior Court's decision, Respondent Department agreed that Petitioner may fairly be said to have had an actual conflict between her working conditions and her bona fide religious beliefs. The fact that petitioner did not immediately refuse to work because of her belief should not have led to the determination that her belief was not sincere, especially in light of her efforts to retain employment and work out an accommodation with her employer.

The payment of unemployment insurance benefits to petitioner would not, therefore, have an adverse effect upon the interest of Respondent Department.

B

Respondent Department's interest does not justify a rule permitting the waiver of First Amendment rights.

Respondent Department need not disqualify unemployment insurance claimants merely because they

continue to work while holding a sincere religious belief that conflicts with their working conditions. The rule enunciated by the California Supreme Court which requires such disqualification is not warranted because alternative means of testing the validity of a claim of religious or conscientious objection are available to Respondent Department. Respondent can adequately protect the Unemployment Insurance Fund from false, fraudulent or invalid claims by making a determination as to whether an individual's stated religious objection to continuing employment actually conflicts with a bona fide religious belief. Such a test would ensure that only those claimants who would be held to have good cause reasons for quitting would be entitled to unemployment insurance benefits. The department's interest would thus be protected from invalid claims. A consideration by Respondent Department of various factors, including the following, would likely lead to a determination whether a religious belief is sincerely held:

1. Whether that belief is among the tenets of a recognized church, sect or denomination or whether it is only the claimant's individual belief.
2. Whether the tenets of the church forbid the claimant from engaging in the objectionable work.
3. Whether the work had a direct rather than indirect effect on the claimant's religious beliefs.

4. Whether the claimant observed all of the tenets of the religion or only those which suited his or her employment preferences.
5. Whether the claimant raised the problem with the employer in order to give the employer the opportunity to change the working conditions.
6. The length of time the belief has been held by the claimant.
7. Whether the belief has been consistently held by the claimant.

The availability of this approach obviates any need to protect Respondent Department's interest by a rule which disqualifies a claimant who continuously holds a religious belief, but who chooses to work and attempt to obtain a modification of her working conditions rather than abruptly quitting her job.

II

THE CALIFORNIA SUPREME COURT ERRED IN HOLDING THAT, UNDER SHERBERT, THE RIGHT TO RELIGIOUS FREEDOM CONSTITUTES "GOOD CAUSE" FOR A REFUSAL OF SUITABLE WORK, BUT THAT SAME RIGHT DOES NOT CONSTITUTE "GOOD CAUSE" FOR THE VOLUNTARY QUIT IN THIS CASE.

The California Supreme Court attempted to distinguish petitioner's refusal to continue employment which conflicted with her religious beliefs from this Court's holding in *Sherbert*. The stated basis for that distinction was the dissimilarity between "good cause"

for a refusal of suitable work and "good cause" for a voluntary quit. That distinction is erroneous and, if upheld, would seriously inhibit the exercise of constitutional rights.

Both California Unemployment Insurance Code sections 1256 and 1257(b) contain a "good cause" requirement. To be entitled to benefits a claimant may not have voluntarily quit his most recent employment unless he or she had "good cause" to do so. Similarly, a claimant must have "good cause" to refuse an offer of suitable work in order to remain eligible for unemployment insurance benefits. When testing for eligibility under section 1256 and disqualification under section 1257(b), Respondent Department must, therefore, determine whether "good cause" exists.

Although the concept of good cause is not totally identical in both contexts, the California courts have used interchangeably the same standard to determine the existence of good cause when the factor advanced as providing good cause is a constitutionally protected right. For example, the California Supreme Court has held that an employee has good cause to refuse suitable work where he has a sincerely held conscientious objection to taking a loyalty oath. *Syrek v. Calif. Unemployment Ins. App. Bd.* (1960) 54 C. 2d 519. The Court stated that "good cause" as used in section 1257(b):

> ". . . means an adequate cause, a cause that comports with the purposes of the Unemployment Insurance Code and with other laws. Regarding it so, we believe that appellant had good cause

for his refusal, from the standpoint of public interest and from that of individual rights."
(54 Cal.2d at 529).

The Court held that a conscientious refusal to take a loyalty oath constituted good cause for refusal to accept suitable employment. In speaking of the constitutional guarantee of freedom of political belief and association the Court noted:

"Limitation of those freedoms by an administrative ruling, even if the limitation is done indirectly by job referral, cannot be supported."
(54 Cal.2d at 531).

Likewise, California courts have held that the First Amendment right to free expression constitutes good cause for voluntarily leaving work. For example, where an employee was required, as a condition of continued employment, to shave off his beard, the Court found his voluntary leaving to be with good cause. *King v. California Unemployment Insurance Appeals Bd.* (1972) 25 Cal.App.3d 199.[2]

The Court in *King* noted that the claimant was not challenging the validity of his dismissal, but was asserting a constitutional prohibition against the State's denial of unemployment insurance benefits. In upholding his constitutional challenge, the Court found a close parallel between this case and the good cause refusal of suitable work in *Sherbert v. Verner.*

[2]See also to same effect *Thornton v. Dept. of Human Resources Dev.* (1973), 32 Cal.App.3d 180; *McCrae v. Calif. Unemployment Ins. App. Bd.* (1973) 30 Cal.App.3d 89.

In *King* the claimant had worked for two years for the employer. The employer had a company rule prohibiting beards. Although King had previously worn a beard, he had removed it before he applied for work. King knew of the company policy against beards, but he nevertheless grew a beard. King asked the employer if he could have work which did not involve public contact, but the employer refused and demanded that the claimant remove his beard. King then quit.

The Court held that the claimant's insistence on wearing a beard constituted a constitutionally protected exercise of free speech and there was no compelling state interest shown to justify an infringement of that protected activity. The Court concluded:

"Our decision goes no further than to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from [or quit] employment because of personal action which is constitutionally protected."
(25 Cal.App.3d at 206).[3]

The real importance of these cases is not their exposition of constitutional law, but rather the fact that prior to the California Supreme Court's decision below, California courts had consistently followed

[3]The California Courts have also used the same test for good cause in cases where employment discrimination constituted the reason for voluntarily quitting work. *Prescod v. Unemployment Ins. Appeals Bd.* (1976) 57 Cal.App.3d 29; *Morrison v. Cal. Unemployment Ins. Appeals Bd.* (1976) 65 Cal.App.3d 245; Cf. *Warriner v. Unemployment Ins. Appeals Bd.* (1973) 32 Cal.App. 3d 353.

Sherbert and protected the exercise of First Amendment rights by holding that such exercise constituted "good cause" for either refusing suitable work or voluntarily leaving a job. The California Supreme Court's decision below is a foreboding departure from this Court's decision in *Sherbert*. As stated in the dissent in this case, such a denial of unemployment insurance benefits because of religious beliefs "constitutes overt hostility to religion and should not be upheld". Appendix to Petition, pp. 26a-27a.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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January 30, 1978.

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND, *Petitioner,*

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, a California corporation, *Respondents.*

REPLY BRIEF OF PETITIONER TOMMIE ANN HILDEBRAND

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Respondents.

REPLY BRIEF OF PETITIONER TOMMIE ANN HILDEBRAND

INTRODUCTION

In opposing Certiorari, respondent Cel-A-Pak's principal claim is that this case is moot.[1] In contrast, respondent

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[1] See, Brief for Respondent CEL-A-PAK (hereinafter "Cel-A-Pak Br.") at 3-8. Cel-A-Pak also raises an issue regarding the Establishment Clause. This issue will not be discussed here but instead will be addressed should Certiorari be granted. See, Sherbert v. Verner, 374 U.S. 398, 409-10 (1963).

Employment Development Department[2] now fully supports the Petition for Certiorari both on the merits[3] as well as in urging that a live controversy between the parties continues to be present.[4] In this brief, petitioner will essentially make two points. First, given the radical change of position of the respondent Department, it would be appropriate to remand this action to the California Supreme Court for initial consideration of the state agency's new viewpoint. And second, should this Court wish to reach the merits, there exists a continuing case or controversy requiring

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[2]Respondent California Employment Development Department is hereinafter referred to as "the Department".

[3]See, Department Response to Petition for Writ of Certiorari (hereinafter "Dept. Resp.").

[4]See, Reply Brief of Respondent California Employment Development Department (hereinafter "Dept. Reply Br.").

resolution in which the position of petitioner is now strongly supported by the very agency of state government charged with the responsibility of interpreting and administering the provision of the California Unemployment Insurance Code here at issue.

I.

IN LIGHT OF THE REVERSAL OF POSITION BY RESPONDENT CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THIS CASE SHOULD BE REMANDED TO THE COURT BELOW FOR FURTHER CONSIDERATION.

Throughout the administrative proceedings in this case and in the trial court, respondent Department took the position that the denial of unemployment insurance benefits to petitioner did not contravene her First Amendment right to freely exercise her religion and was justified because petitioner purportedly left her job voluntarily without good

cause.[5] The Department remained silent in the California Court of Appeal and Supreme Court proceedings.[6] Now, for the first time in this litigation, the Department is reversing its original position entirely and instead fully adopting the position of petitioner (Dept. Resp. at 1), agreeing that "such a denial of unemployment insurance benefits because of religious beliefs constitutes overt hostility to religion and should not be upheld." (Dept. Resp. at 12) (citation omitted). Respondent Department joins with petitioner in urging that the decision of the court below should be set aside:

> Respondent California Employ-

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[5] See, California Unemployment Insurance Code Section 1256.

[6] See, Dept. Resp. at 1-2.

> ment Development Department fully supports the petition herein....Respondent Department is...convinced that the California Supreme Court erred when it refused to apply Sherbert [v. Verner, 374 U.S. 398 (1963)] to this case and instead grafted a concept of 'waiver' to the First Amendment right to freely exercise religious beliefs. As the state agency charged with the administration of the Unemployment Insurance system in California, Respondent Department is required in all similar unemployment insurance eligibility decisions to apply the 'waiver' concept as expressed by the California Supreme Court.

> For these reasons, Respondent Department feels that it is imperative that the Petition for Writ of Certiorari be granted. Dept. Resp. at 1-2 (footnote omitted).

Given the Department's radical change of viewpoint, considerations of prudence and respect for state courts make it appropriate for this Court to vacate the decision of the court below and remand the case so that the Supreme Court of California will have the opportunity to consider the views of the Department - at least in the first instance. For example, the lynchpin of petitioner's argument below (as it is here)[7] was that no compelling state interest justified the state's infringement of petitioner's

[7] Petition for Certiorari at 32-42.

First Amendment rights. The state Department involved now readily agrees:

> The California Employment Development Department has no compelling interest which would justify the denial of unemployment insurance benefits to a claimant who quit her job because of an actual conflict between her working conditions and her bona fide religious beliefs. (Capitalization omitted.) Dept. Resp. at 4.

Indeed, the Department now states that granting benefits in such circumstances would have no "adverse effect upon the interest of Respondent Department." Dept. Resp. at 6. This view and several other points now raised by the Department (see, pp. 11-15, infra) were never put before the California Supreme Court; this

action therefore should be remanded so that they may be given plenary consideration by the court below.[8]

Remanding this case for further consideration due to the intervening change of position by respondent Department is supported both by settled Constitutional doctrine and the general policy of this Court in similar circumstances. An analogous situation occurs when the position taken by a federal agency is modified by the Solicitor General in this Court so that it materially differs from the government position expressed in the lower courts. In such cases, which are quite common, this Court consistently

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[8]Due to vacancies existing on the lower court, the original majority in this case included three pro tem Justices sitting by assignment of the Chairman of the Judicial Council. Those vacancies have now been filled and the court is at full complement.

grants Certiorari, vacates the decision, and remands the case for further consideration by the lower court in light of the change of posture by the government.[9] Similar relief is appropriate in the case sub judice.

Moreover, because the several new factors now raised by the Department were either absent entirely or only tangentially involved when the case was initially considered, they were not directly passed upon by the California Supreme Court.

While this Court nonetheless may have

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[9]See, e.g., Rahman v. Immigration and Naturalization Service, 429 U.S. (mem.) 1084 (1977); Singer v. United States Civil Service Comm., 429 U.S. (mem.) 1034 (1977); Hurst v. United States, 426 U.S. (mem.) 902 (1976); Graham v. United States, 424 U.S. (mem.) 903 (1976); Webb v. United States, 412 U.S. (mem.) 902 (1973); Lenhard v. United States, 405 U.S. (mem.) 1013 (1972).

the authority to review these matters as issues of first impression,[10] it would be in keeping with this Court's previous decisions to allow the California Supreme Court the initial opportunity to do so. See, e.g., Massachusetts v. Westcott, 431 U.S. 322 (1977); Cardinale v. Louisiana, 394 U.S. 437, 439 (1969); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435 (1940); see also Hagans v. Lavine, 415 U.S. 528, 543 (1974).[11]

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[10] Hankerson v. North Carolina, 432 U.S. 233, 240, n.6 (1977); McGoldrick v. Compagnie Generale Trans Atlantique, 309 U.S. 430, 434 (1940).

[11] It should also be noted that the issue of mootness here presented was not addressed by the court below. While petitioner vigorously contests this claim (see, pp. 15-36, infra) a remand to the court below would permit the California Supreme Court initially to make that determination, taking into account the newly recognized interests of the Department as well as those of petitioner and

(fn. contin. next page)

The Department's renewed participation in this case either raises or substantially influences several issues not previously considered by the lower court that are potentially of dispositive importance. These include inter alia the following:

First, as noted above, petitioner has contended throughout that no compelling or otherwise legitimate government interest requires the denial of benefits to claimants who become unemployed due to the good faith exercise of religious beliefs. Respondent Department, in the best position to evaluate the government interest involved, now fully concurs and

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(fn. contin. from preceding page) of Cel-A-Pak. See, e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974); Brockington v. Rhodes, 396 U.S. 41 (1969); cf., Indiana Empl. Security Div. v. Burney, 409 U.S. 540 (1973); A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961).

urges that they have no interest in denying benefits to claimants like petitioner. Dept. Resp. at 4-12.[12] The Department strongly objects to now being required by the lower court's interpretation of the First Amendment to "disqualify from receipt of unemployment insurance benefits California workers who feel bound to follow sincerely held religious convictions." Dept. Resp. at 4. This assessment of the state's interest was not before the court below when it initially reached its decision.[13]

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[12]While the employer has an interest in the administration of the Unemployment Insurance System, it is the state's interest that is controlling for purposes of Constitutional analysis, see, Petition for Certiorari at 38-39.

[13]At least one Justice of the court below believed that a principle basis underlying the majority opinion was doubt regarding the sincerity of petitioner's religious beliefs. Appendix A at 19a

(fn. contin. next page)

Second, an inherent premise for the decision of the majority below was that a rule barring such claimants from obtaining benefits was essential in order to protect the integrity of the trust account. But the Department has now come forward with a proposed set of procedures which would protect against invalid or fraudulent claims but not deny benefits to claimants acting on deeply held religious convictions. Dept. Resp. at 6-8. This approach, not considered by the court below, would provide a less drastic alternative to the flat ban now imposed by the California Supreme Court decision.

(fn. contin. from preceding page)
(Mosk, J., dissenting). Although Department officials initially questioned petitioner's sincerity, "[u]pon review of the record and the Superior Court's decision, Respondent Department agree[s] that Petitioner may fairly be said to have had an actual conflict between her working conditions and her bona fide religious beliefs." Dept. Resp. at 6.

See, Bakke v. Regents of University of California, 18 Cal.3d 34, 49 (1976); cf., Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

Third, and perhaps most significantly, the Department now urges that the "good cause" provision of California Unemployment Insurance Code Section 1256 (voluntary quit), like the almost identical provision of Section 1257 (refusal of suitable work offer), is intended to include within its scope the loss of employment due to the exercise of religious beliefs. Dept. Resp. at 12; accord, Petition for Certiorari at 25-26; compare Appendix A at 8a-9a. Under California law, state courts are to give substantial deference to statutory interpretations by appropriate governmental agencies in making determinations such as

the one here involved.[14] Until now, the court below has not had the opportunity to do so since the Department's views were not available. This case should thus be remanded to the California Supreme Court for consideration of the Department's position on the scope of Section 1256. Cf., Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

II.

THE LITIGANTS AND THE PUBLIC AT LARGE HAVE A SUBSTANTIAL STAKE IN THE OUTCOME OF THESE PROCEEDINGS AND FOR THAT REASON THERE IS A CASE OR CONTROVERSY.

While we suggest the appropriate disposition of this case would be to vacate the decision below and remand the case for further proceedings, should this Court instead choose to reach the merits,

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[14] See, e.g., Morris v. Williams, 67 Cal. 2d 733, 748 (1967); Naismith Dental Corp. v. Board of Dental Examiners, 68 C.A.3d 253, 260 (1977); Handeland v. Department of Real Estate, 58 C.A.3d 513, 517 n.4 (1976).

the mootness doctrine presents no barrier to it doing so. Respondent Cel-A-Pak argues, without citation of authority, that there is no case or controversy before this Court. (Cel-A-Pak Br. at 3.) Respondent's simplistic analysis, however, is belied by the very real and significant consequences affecting the litigants and the public generally which hinge on this Court's review of the decision of the court below.

The mootness doctrine is premised upon both the requirement of Article III of the Constitution that the jurisdiction of the federal courts be limited to "cases and controversies" as well as notions of sound judicial administration. The Court recently reaffirmed this analysis as follows:

> "Embodied in the words 'cases' and 'controversy' are two compli-

> mentary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."

Franks v. Bowman Transportation Co., 424 U.S. 747, 754-55 (1976) quoting Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

Thus, the doctrine serves two principal purposes: (1) to ensure true adversariness and in so doing also preventing the useless expenditure of judicial resources; and (2) to constrain the judiciary from interfering with other branches of government.[15] As we will show in this section, neither of these purposes suggest a finding of mootness is appropriate in the instant case.

A. The Record In This Case Amply Demonstrates That A Decision By This Court Will Have A Significant Effect On All Litigants Before It.

A reversal of the lower court's decision would directly effect each of the parties to this action.

The briefs respondent Department has

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[15] See, Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 375-376 (1974); see also, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, §3533, p. 265.

filed before this Court provide perhaps the best indication of its continued stake in these proceedings. Although it agrees that the rule imposed by the California Supreme Court contravenes the First Amendment, as well as the purposes of the unemployment insurance program it administers, respondent Department will be bound to apply this rule in the future to petitioner and to all similarly situated claimants.[16] Only through the

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[16] Respondent Department states:

> As the state agency charged with the administration of the Unemployment Insurance system in California, Respondent Department is required [to deny benefits to claimants who become unemployed for religious reasons] in all similar unemployment insurance eligibility decisions...." Dept.Resp.at 2.

As a procedural matter, had the Department chosen to petition for Certiorari, rather than support the petition filed by Ms. Hildebrand, there would be no question but that a case or controversy exists. See, Mancusi v. Stubbs, 408 U.S. 204 (1972).

action of this Court can the Department escape that burden. In addition, should the decision below be reversed, the Department will then be authorized to charge respondent Cel-A-Pak's "reserve account" rather than the "balancing account" supported by all California employers.[17]

The interest of respondent Cel-A-Pak is even more apparent. Cel-A-Pak has a concrete stake because of its interest in protecting its reserve account (Cel-A-Pak Br. at 7-8; see also Dept. Reply Br.) as well as an interest in its future responsibilities toward its employees.

Petitioner likewise has a vital and

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[17] See California Unemployment Insurance Code Sections 976-978, 1025-1032.

continuing interest in the outcome of these proceedings. She remains subject to future disqualification from the receipt of unemployment insurance benefits by respondent Department resulting from application of the rule fashioned by the California Supreme Court. Moreover, knowledge of this rule results in a "chilling effect" on her exercise of First Amendment rights. (See pp. 28-30, infra.) As a Sabbatarian, any new employment she finds subjects her to the same potential conflicts between her religious beliefs and her employer's demands, and, unless she forsakes those beliefs, the same disqualification from the unemployment insurance program. She has a sufficient stake in the outcome of these proceedings to warrant this Court's

assumption of jurisdiction.[18]

Thus, in terms of the policies underlying the mootness doctrine, a decision by this Court plainly would not be a useless act or an advisory opinion. Instead, it would be an appropriate review of an important Constitutional question resolving an ongoing dispute in which all parties have an interest.

1. If allowed to stand, the decision of the California Supreme Court interpreting the Free Exercise Clause will be binding on the Department and on unemployment insurance claimants throughout California.

This Court has consistently recognized that where a lower court decision will have a tangible and definite effect on a state's policy with respect either to the

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[18] See, e.g., Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974).

particular litigants or others similarly situated, the mootness doctrine does not bar review. The Court's decision in Richardson v. Ramirez, 418 U.S. 24 (1974) is squarely on point. There, the California Supreme Court ruled that California provisions disenfranchising ex-felons were unconstitutional. A county registrar who had intervened as a defendant appealed to this Court; respondents urged that the case was moot because the three plaintiffs had been allowed to register and vote in their respective counties. Recognizing that absent review, county officials throughout California would be bound to follow the decision of the California Supreme Court, this Court held that the case was not moot:

> By reason of the special relationship of the public officials in a state to the

> court of last resort of that state, the decision of the Supreme Court of California, if left standing, leaves them permanently bound by its conclusion on a matter of federal constitutional law. 418 U.S. at 35.

Respondent Department is similarly bound in the instant case. As in Ramirez, this case was brought as a mandate action against state officials.[19] Although not a class action, the California Supreme Court's decision will bind the respondent Department which will then be required to apply its provisions to unemployment insurance claimants and California employers. To deny the

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[19] Id. at 35 and 40, n.13.

availability of review would be to leave a federal Constitutional decision in force "without any possibility of state officials who were adversely affected by the decision seeking review in this Court." Id. at 40, n.13.

Similarly, in Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974), this Court found a case or controversy existed in an employer's challenge to New Jersey's laws allowing strikers to be eligible for welfare benefits although the strike prompting the challenge had long since ceased. The Court's holding centered on the continuing effects of the "fixed and definite" (Id. at 124) governmental policy being challenged:

> [T]he challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its con-

tinuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties. 416 U.S. at 122.

Likewise, if allowed to stand, the California Supreme Court's decision becomes the "fixed and definite" interpretation of Section 1256 binding not only on future claims of petitioner but all other workers whose religious beliefs may create a conflict with the demands of their employers.

In Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968), county officials had obtained a 10-day injunction against the petitioners, restraining them from holding political rallies, which the Maryland Court of Appeals had affirmed. The petitioners sought review from this Court, contending

that the injunction order continued to affect them because local officials had on several occasions denied them rally permits or issued them only very limited permits, based on the Court of Appeals' decision. This Court found:

> We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities. In these circumstances, our jurisdiction is not at an end. 393 U.S. at 178 (footnote omitted).

Similarly, the California Supreme Court's ruling, if allowed to stand, will govern all present and future determinations by the respondent state agencies as to whether religious beliefs can constitute good cause for leaving work. Given the significant Constitutional dimensions of the state's policy, and its conflict with this Court's decision in Sherbert v. Verner, 374 U.S. 398 (1963), the need for and propriety of review by this Court is manifest.

2. Absent review by this Court, several collateral consequences will result from the decision below adversely affecting petitioner and "chilling" the exercise of First Amendment rights.

Unless reversed by this Court, the decision of the court below will result in serious and detrimental "collateral consequences" to petitioner Hildebrand and other workers with strongly held

religious beliefs.[20]

One such consequence will be the "chilling effect" on the exercise of religious beliefs by petitioner.[21] The exercise by petitioner of her First Amendment rights is now subject to "waiver" under the decision of the California Supreme Court; petitioner is aware that if she accedes to an employer's demand to violate her religious precepts even once, she may never again be able to adhere to them without fear of firing and denial of unemployment benefits. On the other hand, California

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[20] See, Sibron v. State of New York, 392 U.S. 40, 53-58 (1968); Southern Pacific Co. v. ICC, 219 U.S. 433, 452 (1911); Kates & Barker, Mootness in Judicial Proceedings: Toward a Coherent Theory, 62 Cal.L.Rev. 1385, 1391-94 (1974); see also Carroll v. President and Commissioners of Princess Anne, supra.

[21] See Allee v. Medrano, 416 U.S. 802, 810 (1974); see also Super Tire Eng'r Co. v. McCorkle, supra.

employers will be strongly encouraged by the California Supreme Court's decision not to make even a "reasonable accommodation"[22] to religious beliefs. They will be aware that in order for employees like petitioner to assert religious convictions, they must run the serious risk of loss of employment and disqualification from the receipt of sustaining unemployment benefits. In light of these effects, the California decision should not be allowed to escape review.

3. The Constitutional injury here involved will necessarily be repeated but will evade meaningful review.

The policies authorizing this Court to entertain cases which are "capable of repetition yet evading review[23] also

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[22] See, Trans World Airlines, Inc. v. Hardison, ____ U.S. ____, 97 S.Ct. 2264 (1977).

[23] See Southern Pacific Terminal v. ICC, 219 U.S. 498, 515 (1911).

support the Court's jurisdiction in this case. There can be little doubt that if the decision of the California Supreme Court is allowed to stand, the petitioner, as well as other persons in her position, will be denied benefits in similar situations and will suffer the same infringement on their right to free exercise of religion.[24] Indeed, the respondent Department correctly believes itself bound to implement the rule fashioned by the lower court, although the Department believes it will be violative

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[24] That the injury complained of here will also affect persons situated similarly to the petitioner is sufficient to demonstrate a case or controversy. See, Roe v. Wade, 410 U.S. 113 (1973); Moore v. Ogilvie, 394 U.S. 814 (1969). Citing these cases, this Court said in Super Tire Eng'r Co. v. McCorkle, supra:

> The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society.
> 416 U.S. at 126.

of claimants' constitutional rights to do so. Resp. Br. at 2.

Despite this strong likelihood of repetition, it is highly unlikely that any future claimant, disqualified by the rule set out in this case, will be able to obtain effective review from this Court. First, such review would require futile appeals through two levels of the administrative process, the California Superior Court, District Court of Appeal, and California Supreme Court, before finally reaching this Court.[25]

Second, and perhaps more importantly, by the time such a case reached this Court, the salutory purposes which the unemployment program was designed to achieve would long since have been lost for that claimant. See, California Department of Human Resources Development

[25]Franks, supra, 424 U.S. at 757.

v. Java, 402 U.S. 121, 133 (1971).[26] This Court has frequently looked to the purposes of the statute at issue to determine whether a case or controversy exists. See, e.g., Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463 (1968); see also NLRB v. Raytheon Company, 398 U.S. 25 (1970); Liner v. Javco, Inc., 375 U.S. 301 (1964). Since neither the state agency administering the program nor any ineligible claimants could seek effective review of subsequent

[26]As the Chief Justice has pointed out, the purpose of the unemployment insurance program is to "get...money into the pocket of the unemployed worker at the earliest point that is...feasible" (Id. at 135). And, further:

> Paying compensation to an unemployed worker promptly after initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes.
> Id. at 133.

determinations based on the lower court's decision in this case, the instant action falls within the ambit of cases "capable of repetition, yet evading review." Roe v. Wade, 410 U.S. 113, 125 (1973).

B. Granting Certiorari In This Case Would Not Result In Judicial Interference With Another Branch Of Government.

Since this action involves the California Supreme Court's Constitutional construction of a state statute, granting review would not intrude on areas reserved for any other branch of the government. See Franks v. Bowman Transportation Co., supra, 754-55. To the contrary, the judicially created rule here at issue is itself in direct conflict with both the policies and statutory interpretation of "the state agency charged with the administration of the

Unemployment Insurance System in California." Dept. Resp. at 2.

III.

CONCLUSION

That this case presents a lively and hotly contested dispute, assuring the requisite adversariness, is readily apparent from the record in this case. The petitioner vigorously opposed respondent Cel-A-Pak's appeal in the California District Court of Appeal and Supreme Court. Moreover, the respondent Department's support of the Petition adds a new dimension of adversariness, for without review by this Court, it will be forced to apply a statute in a manner which it feels is unconstitutional and harmful to the persons the system it administers is designed to serve. The Petition for Certiorari should be granted and the opinion below either vacated and

remanded for further consideration or

reversed in its entirety.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND,
Petitioner,

vs.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, INC., a California corporation,
Respondents.

REPLY BRIEF OF RESPONDENT CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, RULE 24(4)

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REPLY BRIEF OF RESPONDENT CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, RULE 24(4)

PRELIMINARY STATEMENT

Respondent Department must reassert that this case involves an issue of fundamental First Amendment rights. Unless the decision below is reversed, Respondent Department will be required to disqualify Unemployment Insurance claimants who attempt to exercise good faith religious beliefs. The purpose of this brief, however, is to clarify erroneous statements made by Respondent Cel-A-Pak in its Opposition to the Petition for Writ of Certiorari. Respondent

Cel-A-Pak has incorrectly stated the facts concerning its unemployment "reserve account" and then argued that there is no case and controversy. Neither of these propositions is correct.

STATUTORY PROVISION INVOLVED

Section 1338 of the California Unemployment Insurance Code provides as follows:

> "If the Appeals Board issues a decision allowing benefits the benefits shall be paid regardless of any further action taken by the directors, the Appeals Board, or any other administrative agency, and regardless of any appeal or mandamus, or other proceeding in the courts. If the decision of the Appeals Board is finally reversed or set aside, no employer's account shall be charged with the benefits paid pursuant to this section."

ARGUMENT

I

CEL-A-PAK'S RESERVE ACCOUNT WAS NOT CHARGED

Respondent Cel-A-Pak argues first that its Unemployment Insurance reserve account was charged (p. 7, Brief in Opposition), and then that it is confused as to the status of its reserve account (p. 8, Brief in Opposition). There is no reason for any confusion, nor any basis for the assertion that Respondent Cel-A-Pak's reserve account has been charged. Pursuant to Unemployment Insurance Code Section 1033,[1] Respondent Department has furnished

[1]All references are to the California Unemployment Insurance Code.

Respondent Cel-A-Pak annual tax statements which itemize the charges against its reserve account.[2] These notices reflect that no charges have been made to Respondent Cel-A-Pak's reserve account for petitioner Hildebrand's unemployment insurance benefits.

No charges were assessed against Respondent Cel-A-Pak's account pursuant to Unemployment Insurance Code Sections 1338 and 1380, regarding petitioner because Respondent Cel-A-Pak appealed the Superior Court decision. Whether Respondent Cel-A-Pak's account is ultimately charged with petitioner's Unemployment Insurance benefits will depend upon the decision of this Court.

II

THERE IS AN ACTUAL CASE AND CONTROVERSY INVOLVING RESPONDENT CEL-A-PAK'S TAX LIABILITY AS WELL AS THE PROTECTION OF FIRST AMENDMENT RIGHTS.

In addition to the fact that the decision below will require Respondent Department to disqualify unemployment insurance claimants who, like petitioner, attempt to exercise good faith religious beliefs, the question of charges to Respondent Cel-A-Pak's "reserve account" constitutes a case and controversy within the meaning of Article III, Section 2 of the Constitution.

Under the California Unemployment Insurance system, benefits paid to an unemployed individual during any benefit year are charged against the re-

[2]At its request, Respondent Cel-A-Pak has been sent duplicate copies of the pertinent portions of these tax statements.

serve account of the person or entity which employed the individual during the period of time upon which his entitlement to benefits is based. The amount of money an employer is required to pay into the state unemployment fund is based on benefits paid to terminated employees which are charged to its reserve account. Sections 1025-1032, 976-978. (See *California Department of Human Resources Development v. Java* (1971) 402 U.S. 121.)

In this case, Respondent Department paid the benefits due petitioner pursuant to the decision of the California Unemployment Insurance Appeals Board which appears in the Appendix to the Petition, pages 90a-92a. However, before Respondent Department could assess Respondent Cel-A-Pak's account for those benefits pursuant to Board's decision, Respondent Cel-A-Pak appealed. While the issue was on appeal, Respondent Department did not assess petitioner Hildebrand's charges. The California Supreme Court reversed the Superior Court's decision upon which the Board's direction to charge Respondent Cel-A-Pak's account was based. The effect of the California Supreme Court's decision is to prevent charges against Cel-A-Pak's reserve account unless that decision is reversed by this Court. However, if it is reversed, Respondent Cel-A-Pak's reserve account can and will be charged.[3]

[3]Benefits which are not chargeable to any individual employer's reserve account are charged to the "balancing account". Section 1027(b). All employers pay into this account at the same rate. Sections 976.5, 1027. The costs of petitioner's benefits thus far have been charged to this balancing account. Respondent Department has the responsibility of ensuring that only those benefits which are not chargeable to a specific employer are charged to the balancing account.

This Court's decision will determine the issue of Respondent Cel-A-Pak's tax liability. Respondent Department will not assess charges against Respondent Cel-A-Pak's account if the decision below is affirmed. Conversely, Cel-A-Pak's reserve account will be charged if that decision is reversed.

CONCLUSION

There is a case and controversy. The deprivation of constitutional rights required by the decision below can only be remedied by this Court. The Petition should be granted. The tax issues raised by Respondent Cel-A-Pak, if they affect this case at all, only support that conclusion.

Respectfully submitted,

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February 10, 1978.